92-795

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Larry Pounds,
Petitioner,

vs.

David Griepenstroh, Hugh Barclay,
and **Spencer County, Indiana,**
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 4, 1992

QUESTIONS PRESENTED

1. Is the United States Court of Appeals for the Seventh Circuit in conflict with the decision of the Supreme Court in *Anderson v. Creighton,* 483 U.S. 635 (1987), and in conflict with other federal courts of appeals, by holding that a constitutional right is not "clearly established" unless a nearly identical case has been decided, and by granting qualified immunity in practically every case of first impression to officials who violate constitutional rights?

2. Is the United States Court of Appeals for the Seventh Circuit, by focusing its inquiry in patronage dismissal cases on the potential of the public office in question to be politicized, even wrongfully, rather than on the legitimate public purpose of the office itself, in conflict with the decision of the Supreme Court in *Branti v. Finkel,* 445 U.S. 507 (1980)?

3. Does the decision of the United States Court of Appeals for the Seventh Circuit, reversing the trial court and granting qualified immunity to the defendants Commissioners of Spencer County, Indiana, for the political discharge of a County Veterans Service Officer, conflict with the decisions of the Supreme Court in *Anderson v. Creighton,* 483 U.S. 635 (1987) and in *Branti v. Finkel,* 445 U.S. 507 (1980)?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Court of Appeals for the Seventh Circuit:

Plaintiff-Appellee Larry Pounds, who is the petitioner in this court; Defendants-Appellants David Griepenstroh, Hugh Barclay, Louis Lubbehusen, and Spencer County, Indiana, all of whom but Louis Lubbehusen are respondents in this court. Louis Lubbehusen died in December, 1991 and a Notice and Suggestion of Death of Louis Lubbehusen was filed in the District Court on July 10, 1991. No motion for substitution of his personal representative has been made.

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No.

In The

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October Term, 1992

Larry Pounds,

Petitioner,

vs.

David Griepenstroh, Hugh Barclay,
and **Spencer County, Indiana,**

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, a politically discharged county Veterans Service Officer, petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in *Larry Pounds v. David Griepenstroh, et al.*, Cause No. 91-2372, on the 6th day of August, 1992. The Judgment reversed the decision of the United States District Court for the Southern District of Indiana.

OPINIONS BELOW

The decision of the Seventh Circuit is reported at 970 F.2d 338, and is reprinted in the Appendix at page 1. The decision of the district court, denying the motion of the respondent Commissioners for summary judgement of dismissal on grounds of qualified immunity, is unreported. The memorandum opinion of the district court is reprinted in the Appendix at page 12.

JURISDICTION

The judgment to be reviewed was entered on August 6, 1992. No petition to rehear the judgment was filed. This court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Facts:

The petitioner Larry Pounds had served as county Veteran's Service Office [VSO] for Spencer County, Indiana, continuously since 1983, in successive one-year appointments. *Pounds v. Griepenstroh,* 970 F.2d 338, 339 (7th Cir. 1992) (App. 1, 2). The appointment of VSO's at the municipal level in Indiana is optional with local executive bodies. Ind. Code § 10-5-1-11. VSOs, if appointed, serve under the supervision of the state director of veterans' affairs, and are subject to the same regulations as employees of the Indiana department of veterans' affairs. *Id.*

The non-political function of VSO's, and other employees of the Indiana department of veterans' affairs[1] in January, 1989, was

> ". . .to do such acts at the request of any veteran of the armed forces, or his or her spouse, surviving spouse or dependents, which shall be necessary or reasonably incident to obtaining or endeavoring to obtain for the person so making such request any advantage, benefit or emolument accruing, due or believed to be accruing or due to such person under any law of the United

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[1] In January, 1989, the department was denominated the "veterans' state service department." Indiana P.L. 3-1989, § 236, effective May 5, 1989, renamed the department and made stylistic, not substantive, changes in wording in the section.

> States, the state of Indiana or any other state or government by reason of the service of such veteran in the armed forces of the United States."

Ind. Code §§ 10-5-1-3 (a). The Department is administered by the Veteran's Affairs Commission, a bi-partisan panel of four appointed by the governor, no more than two of whom may be of the same political party. The commission establishes rules and regulations for the department and makes general administrative policies. Ind. Code §§ 10-5-1-7 and 10-5-1-8. *Pounds*, 970 F.2d at 339.

In January, 1989, with the election of two new members to the County Board of Commissioners, the commissioners voted not to reappoint Pounds as VSO. When Pounds learned of his impending dismissal and remonstrated, he was told by one of the commissioners, in the presence of the others, that the decision to replace him as VSO was "one hundred and ten percent politics." 970 F.2d at 340, n. 1 (App. 4), *Pounds v. Griepenstroh, et al.*, No. EV 89-35-C (S.D. Ind. June 27, 1991) Memorandum Opinion pages 4-5 (App. 12, 13). Pounds filed suit in District Court pursuant to 42 U.S.C. § 1983, alleging that he had been dismissed as county VSO because he was a Republican. 970 F.2d 339 (App. 1), Memorandum Opinion, page 2, (App. 4).

The district court correctly found that party affiliation with the county commissioners could not be necessary or appropriate for the performance of the duties of VSO, because VSOs are supervised by the Veteran's State Service Officer and not by the commissioners who appoint them. Although the commissioners had voted to require the VSO to present monthly reports to the commission, and to maintain fixed office hours, the district court found that "[n]one of these activities require party affiliation for the effective performance of the position. . . [or] provide the Commissioners with any substantive authority over the performance of the duties of the Veteran's Service Officer." Memorandum Opinion, page 3 (App. 12).

Proceedings Below

The respondents filed a motion for summary judgment based in part on the defense of qualified immunity. The district court denied the summary judgment motion because the respondents did not demonstrate that party affiliation is necessary to the effective performance of a VSO. 970 F.2d at 339 (App. 1), Memorandum Opinion, pages 2-4 (App. 12, 14). Pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) the respondents took an interlocutory appeal. The Court of Appeals for the Seventh Circuit reversed.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S *PER SE* TEST RESULTS IN A FINDING OF QUALIFIED IMMUNITY IN PRACTICALLY EVERY CASE OF FIRST IMPRESSION, IN CONFLICT WITH THE DECISION OF THIS COURT IN *ANDERSON V. CREIGHTON*, 483 U.S. 635 (1987), AND WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

In *Anderson v. Creighton*, 483 U.S. 635 (1987) this court said, unequivocally, that official actions are not protected by qualified immunity merely because "the very action in question" has not yet been held unlawful. *Anderson*, 483 U.S. at 640, citing *Mitchell*, 472 U.S. at 535, n. 12. In the Seventh Circuit, however, it is the norm to extend qualified immunity to public officials in all but the most egregious cases, unless a prior court decision has condemned the precise official act in question. Writing for a unanimous Seventh Circuit panel in the decision below, Coffey, J., recognized the Seventh Circuit's general disinclination to follow *Anderson*:

> "[I]t is difficult to imagine how many plaintiff, under *Anderson*, could have a clearly established right to be free from patronage dismissal unless a

> nearly identical case had already been decided. *Cf. Greenberg v. Kmetko*, 922 F.2d 382, 385-86 (7th Cir. 1991) (Cudahy, J., concurring) ('[T]he law of qualified immunity, as it has developed in this circuit, has tended to find qualified immunity in almost any case of first impression.')"

970 F.2d at 341 (App. 7).

It appears that in the Seventh Circuit, ". . . the level of generality at which the relevant 'legal rule' is to be identified," *Anderson, supra,* at 639, in political discharge cases is that of nearly complete factual congruity. Not only does this interpretation of *Anderson* amount to a clear misapplication of that decision, but also it is in conflict with decisions of other federal courts of appeals. Only in the Seventh Circuit has the level of generality at which a constitutional right must be established in order to be *clearly* established, *Anderson,* at 639, been set at that of almost completely corresponding facts.[2] The "One Bite" Rule has no application in First Amendment political firing actions. For this Court to allow such a result to stand in this case would render impotent prior decisions of this Court and well reasoned decisions of other circuits.

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[2] In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this court left open the question of when a constitutional right has become so clearly established that a public official cannot claim qualified immunity for violating it. 457 U.S. at 818, n. 32. The circuits are not unanimous as to the scope of decisional authority to which to look to determine when a constitutional right has become clearly established for qualified immunity purposes. The Seventh Circuit, although requiring close factual congruity in the decisions, looks to relevant decisions of all courts of appeals and district courts in the absence of an authoritative pronouncement by the Supreme Court. *Williams v. Anderson,* 959 F.2d 1411, 1415 (7th Cir. 1992). The Sixth Circuit, for example, looks first to ". . . binding precedent from the Supreme Court, the Sixth Circuit, or from [the trial court] itself." *Ohio Civil Service Employee's Association v. Seiter,* 858 F.2d 1171, 1177 (6th Cir. 1988). Decisions of other courts, to be considered authoritative by the Sixth Circuit, ". . . must both (continued)

See, *e.g.*, *Shabazz v. Coughlin*, 852 F.2d 697, 701 (2d Cir. 1988) (the absence of specific authority directly on point will not preclude a finding that the law was clearly established); *Bennis v. Gable*, 823 F.2d 723, 733 (3rd Cir. 1987) (no requirement of absolute factual identity); *Tarantino v. Baker*, 825 F.2d 772, 775 (4th Cir. 1987) (some actions must be held unconstitutional even if no reported case involves identical circumstances); *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989) (the very action in question is not the test); and *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990) (substantial correspondence must be demonstrated between the conduct in question and prior law).

II. CIRCUIT LAW OF THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS COURT IN *BRANTI V. FINKEL*, 445 U.S. 507 (1980) AND IN *ELROD V. BURNS*, 427 U.S. 347 (1976) BY DENYING FIRST AMENDMENT PROTECTION FROM PATRONAGE DISMISSAL TO PUBLIC EMPLOYEES WHOSE OFFICES, EVEN IN DEROGATION OF LEGITIMATE PUBLIC PURPOSE, THEORETICALLY COULD BE POLITICIZED.

The Seventh Circuit has observed that

> ". . . between the strictly menial government worker (who under *Elrod* and *Branti* is completely protected from patronage firing) and the policymaking/confidential assistant (whose

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(footnote continued) point unmistakenly to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt [that the] conduct was unconstitutional." *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992). *Cf.* Kinports, *Qualified Immunity In Section 1983 Cases: The Unanswered Questions*, 23 Ga. L. Rev. 597, 605-06, n. 41 (1989).

> protection from patronage firing is nonexistent), there is a range of government positions for which the propriety of patronage firing has depended largely upon the courts' juggling of competing constitutional and political values."

Upton v. Thompson, 930 F.2d 1209, 1213, rehearing denied 938 F.2d 84 (7th Cir. 1991). In the decision to be reviewed, the Seventh Circuit recognizes that, as such balancing is done in the Seventh Circuit, "[a] plaintiff has little chance of winning a case of first impression unless she occupies an extremely high or low rung on the bureaucratic ladder." 970 F.2d at 341 (App. 7). *Anderson*, of course, makes clear that if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right," 438 U.S. at 638, the defense of qualified immunity will fail, notwithstanding that the precise act in question has not previously been held unlawful. Yet as circuit law in the Seventh Circuit has developed, public officials who abusively discharge government workers for patronage reasons, except from "strictly menial" jobs, need not fear loss of their qualified immunity unless the precise positions that they target (or ones very nearly the same) have already been judicially determined to be nonpolitical.

Even so, the decision to be reviewed goes further. It makes any public office fair game for patronage if it is even *possible* for the appointing authority to turn its performance to political advantage. The petitioner's job, as county VSO, was at the lowest level in the statutory scheme in Indiana for the provision of veterans' services. He was supervised not by the commissioners who appointed him, but by a state official (appointed by the governor), who reports to a bipartisan commission. The sole nexus of this position to the commissioners, other than hiring, is that the commissioners can eliminate it, or support it to a greater or lesser extent with funding and office space. If the commissioners should decide to increase funding for the position, however, it is the state director of veterans' affairs, not the commissioners, who will determine how the VSO will use the money. Ind. Code 10-5-1-11.

The rationale of the Seventh Circuit for its holding[3] that Indiana county VSOs such as the petitioner were not clearly exempt from patronage dismissal in 1989 has implications far beyond this case for the meaning and application of the Seventh Circuit's *per se* test for qualified immunity:

> "County VSOs in Indiana report to state officials and follow their policies, but they also must look to the county commissioners for funding, office space, *and, most importantly, appointment.* Moreover, county VSOs provide aid to local veterans, and it is *possible* that someone running for the elected position could make promises to the public, and in particular the veterans, as to how the allocated funds will be used in social programs. When elected, the commissioner has every reason to believe that the only way to fulfill these promises is to appoint a VSO with a similar ideology."

970 F.2d at 343 (App. 10, emphasis supplied).

Only by usurping Indiana's statutorily provided structure for regulating veterans' services at the local level could the commissioners arrogate to themselves a political interest in controlling the manner in which the Spencer County VSO does his job. Therefore, the decision to be reviewed strongly supports

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[3]The Seventh Circuit relied on *Savage v. Gorske*, 850 F.2d 64 (2d Cir. 1988) (applying New York Law) for an answer to the "key question," 970 F.2d at 343 (App. 8-9) of the commissioners' reasonable belief that Pounds could be fired. New York has a scheme to for providing services to veterans at the local level, but there is a significant difference from Indiana Law. In New York, the state Veterans' Service Agency that supervises VSOs is comprised predominately of state department heads, who are political appointees of the governor. N.Y. Executive Law §§ 350, 357, 358 (McKinney 1981).

the proposition that even positions where incumbents are typically subject to termination only for cause, such as schoolteacher, *Guerra v. Roma Independent School District,* 444 F.Supp. 812 (S.D.Tex. 1977), or building inspector, *Dyke v. Otlowski,* 154 N.J.Super. 377, 381 A.2d 413 (1977), become patronage positions by definition if the appointing authority chooses to politicize them.

The standard for the evaluation of a public employee's right to be free from patronage dismissal is established in *Branti v. Finkel,* 445 U.S. 507 (1980):

> "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

445 U.S. at 518. The focus of the analysis mandated by *Branti,* however, is not whether a public office is *capable* of being politicized, but whether party affiliation is an appropriate requirement for its effective performance.

An objectively reasonable public official must evaluate the political sensitivity of a public job at an objectively reasonable level of generality, *Anderson,* 483 U.S. at 639. In the Seventh Circuit, this is the level at which "the position . . . authorizes, either directly or indirectly, meaningful input into government decision making on goals or their implementation." *Nekolny v. Painter,* 653 F.2d 1164, 1170 (7th Cir. 1981), cert. denied 455 U.S. 1021 (1982). In the decision to be reviewed, the Seventh Circuit has expanded the "meaningful input" concept of *Nekolny* to include any position in which the incumbent could be influenced by the appointing authority to administer the office in a politically partisan manner. The decision to be reviewed could grant qualified immunity in such cases, even where politicizing the job in question is inconsistent with its proper performance or, as in the case of county VSOs in Indiana, conflicts with public policy as expressed by state statute. Ind. Code §§ 10-5-1-3 and 10-5-1-5(a).

III. THE DECISION TO BE REVIEWED DEMONSTRATES THE NEED FOR THE SUPREME COURT TO RESOLVE "INCREASINGLY INTRACTABLE" PROBLEMS FACED BY THE COURTS IN APPLYING *ELROD* AND *BRANTI* TO MID-LEVEL PUBLIC OFFICERS WHO ARE VICTIMS OF WRONGFUL TERMINATION BECAUSE OF POLITICAL PATRONAGE.

The decision to be reviewed demonstrates the need for this court to resolve the question, raised by *Branti* of how to evaluate the political sensitivity of a public office for first amendment purposes. This is the problem noted by Justice Scalia in his dissent in *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 110 S.Ct. 2729, 2746 (1990). It is on this point that the Seventh Circuit finds *Branti* to be "almost incurably vague" to begin with, and believes that cases involving *Branti* principles are thus becoming increasingly intractable." 970 F.2d at 341 (App. 7), quoting *Meeks v. Grimes,* 779 F.2d 417, 419 (7th Cir. 1985).

The Seventh Circuit decision creates political tension, which heretofore did not exist between the local councils or commissions upon whom they depend for their existence and pay, and the bipartisan State Department of Veteran's Affairs under the auspices and supervision of which they must work. For the local officials to politicize the VSO in the manner perceived, without evidence thereof, by the Seventh Circuit would permit the Indiana Code to be rendered meaningless by making the local authorities and not the State agency the "supervisors" of this important post.

To avoid replacement for cause, Indiana VSOs must perform to the reasonable satisfaction of their local appointing authorities even, apparently, to the displeasure of the state director of veterans' affairs. The latter, a political appointee of the governor, Ind. Code § 10-5-1-7, may be of the same or different political persuasion than the appointing authority. Citing *Savage, supra,* the Seventh Circuit found that Indiana VSOs are subject to patronage dismissal given

> "[T]he logical rationale [] that the VSO's discretionary choices concerning the budget

> objectives or goals for the county, or the executive's policy as to how and when, and for what, county funds should be spent. In such circumstances, the executive could logically believe that it was important that the VSO share the same political outlook."

970 F.2d at 342-43 (App. 9).[4] Whether to fund a VSO at the municipal level, and if so by how much, is a decision that state law in Indiana assigns to the political discretion of county and city executive bodies. Once established, the position itself functions only to assist veterans to gain access to entitlements. Ind. Code § 10-5-1-3. The appointing authority is specifically excluded from the supervisory structure. *Id.* By appointing and funding VSOs, local executive bodies thus make the political choice to use their local public resources, or not, to make entitlements more accessible to veterans. Congress and the state legislatures, however, make the political decisions to create and fund such entitlements, and to determine eligibility for them.

The petitioner submits that the decision to be reviewed not only was incorrectly decided by the Seventh Circuit, but also presents a factual and legal context that points out the need, and provides the opportunity, for the Supreme Court more precisely to define the application of *Elrod* and *Branti* to mid-level governmental officals.

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[4]The Seventh Circuit goes on to refer to *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988), and *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985), for the proposition that political considerations may be appropriate for the appointment of officials who will operate autonomous once in office. That is a different question to whether *Elrod* and *Branti* permit the patronage dismissal of autonomous mid-level officials who already have been appointed, and are performing their jobs satisfactorily.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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November 4, 1992

APPENDIX

In The
United States Court of Appeals
For the Seventh Circuit

No. 91-2732

LARRY POUNDS,

Plaintiff-Appellee,

v.

DAVID GRIEPENSTROH, HUGH BARCLAY,
and LOUIS LUBBEHUSEN,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. EV 89-35-C–Gene E. Brooks, *Chief Judge.*

ARGUED FEBRUARY 13, 1992–DECIDED AUGUST 6, 1992

Before COFFEY and FLAUM, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* Larry Pounds, former Veteran's Service Officer (VSO) of Spencer County, Indiana, sued Spencer County and members of the Spencer County Board of Commissioners, alleging that the Board's decision not to reappoint him as VSO in 1989 was politically motivated, and therefore, violated his rights under the first and fourteenth amendments. 42 U.S.C. § 1983. The defendant commissioners moved for summary judgment on the ground of qualified immunity, but the district court denied the motion. We disagree with the trial court's finding and reverse, holding that the defendant commissioners are entitled to qualified immunity.

BACKGROUND

Indiana's Department of Veterans' Affairs assists veterans in obtaining "any advantage, benefit or emolument" to which they may be entitled. Ind. Code § 10-5-1-3(a). The Department is headed by the Veteran's Affairs Commission, a four-person group appointed by the governor and containing no more than two members of the same political party, which establishes rules and regulations for the Department and makes general administrative policies. Ind. Code § 10-5-1-5(a) and 10-5-1-6. The Director of Veterans' Affairs, also appointed by the governor, oversees the Department's daily operation and ensures that the policies of the governor and the Commission are carried out. Ind. Code § 10-5-1-7 and 10-5-1-8. The Director likewise supervises the county and city VSOs, though they are appointed by the local county commissioners or city council. Ind. Code § 10-5-1-11.

In Spencer County the VSO serves a one-year term at the pleasure of the County Board of Commissioners. The plaintiff was appointed VSO in 1981 and again in 1982, but resigned in September of that year. He was appointed again in mid-1983, and reappointed every year until 1989. On January 3, of 1989 the three-member Board, containing two recently-elected commissioners (defendants Lubbehusen and Griepenstroh), chose not to reappoint Pounds, and instead appointed Don Patmore to the position of Spencer County VSO. Pounds filed suit, alleging that the Board refused to reappoint him because he was not a Democrat, and that this deprived him of his right to free speech and association and equal protection.

The district court denied the defendants' summary judgment motion, finding that they were not entitled to qualified immunity because they had not demonstrated that political allegiance was essention in a VSO. As allowed by *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) the defendants have taken an interlocutory appeal from this ruling. We review this decision *de novo*. *Upton v. Thompson*, 930 F.2d 1209, 1211 (7th Cir. 1991).

DISCUSSION

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) the Supreme Court held that

> governmental officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

This protection, known as qualified immunity, serves an important purpose.

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.

Id. at 819 (footnote and internal quotation marks omitted). Qualified immunity shields officials from the burdensome demands often imposed on those who must defend a lengthy lawsuit by requiring the right allegedly violated to have been clearly established at the time of the official's action. *Id.* at 818; *Siegert v. Gilley*, _____ U.S. ____, 111 S. Ct. 1789, 1799-94 (1991). The rationale is that "[i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be fairly said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. A right is "clearly established" for qualified immunity purposes only where "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right," and "in the light of pre-existing law the unlawfulness [of the offical's acts was] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Thus, where the law at the time of the act was not sufficiently developed to put the official on notice that his or her act would violate the plaintiff's statutory or constitutional rights, the official is immune from liability. This standard is high, but it serves the dual purposes of qualified immunity: it allows officials to carry out their duties confidently, without fear of incurring unexpected liability, and it allows courts to dispose of insubstantial claims prior to trial, sparing officials from unnecessary litigation. The standard is objective, based on what a reasonable official would or should have known and thought in the same circumstances, given the state of the law at that time. *id.* at 639.

In this case Pounds contends that the defendants violated his right to be free from politically motivated employment decisions when they refused to reappoint him as county VSO because he was not a Democrat.[1] Generaly, a public employee cannot be fired or subjected to other adverse employment decisions solely for political reasons. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Rutan v. Republican Party of Illinois*, _____ U.S._____, 110 S. Ct. 2729, 2756 (1990). There is an exception to this rule where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[2] *Branti*, 445 U.S. at 518. Party affiliation is an appropriate job requirement where

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[1] As evidence of the defendants' political animus, Pounds stated in his deposition that when he asked commissioner Lubbehusen whether the reason for the Board's decision was "one hundred and ten percent politics" Lubbehusen replied, "Yes, you're a big boy, you ought to understand that." Pounds Dep., at 148.

[2] This language raises an interesting issue as to who bears the burden of proof in qualified immunity cases involving patronage dismissals. *Branti's* reference to what "the hiring authority can demonstrate" indicates that the defendant official bears the burden of proving that political allegiance

(Footnote continued on following page)

"the position held by the individual authorizes, either directly or indirectly, meaningful input into government, decisionmaking on issues where there is room for principled disagreement on goals or their implementation." *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981). Given these standards, the question we must answer is: Could the defendants, in light of what they knew about the duties and powers of a county VSO and the law at the time, have reasonably believed that they could refuse to reappoint Pounds solely because of his political affiliation?

Initially, we review the powers and duties of a county VSO, as the functions performed by an official often determine whether he plays a role in setting or implementing policy. Our inquiry is limited to the powers inherent in the office itself;

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[2](continued) was essential to the plaintiff's effective performance. On the other hand, our cases state that, in order to defeat, a claim of qualified immunity, the plaintiff bears the burden of pointing to analogous cases establishing that the constitutional right claimed to have been violated was clearly established. *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988); *see also Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991); *Abel v. Miller*, 824 F.2d 1522, 1534 (7th Cir. 1987). Thus, there is a shifting burden of proof under these circumstances. Initially, the plaintiff must allege the violation of some constitutional right. *Siegert*, _____ U.S. at _____, 111 S. Ct. at 1793-94. Next, the plaintiff must attempt to demonstrate that the right is clearly established by referring the court to analogous cases that would have put the defendants on notice that their acts were illegal. Finally, the defendants must respond to the plaintiff's argument by proving, through prior decisions or otherwise, that they could reasonably have believed that their acts were constitutionally permissible, either because the plaintiff's right was not so clearly established that the unlawfulness of their acts was apparent, or because political allegiance actually was a legitimate job requirement in the particular case.

we are not interested in whether or not a particular occupant may have turned the office into a political one. *Upton*, 930 F.2d at 1214; *Hudson v. Burke*, 913 F.2d 427, 431 (7th Cir. 1990). The Indiana Code reveals that VSOs are appointed by the county commissioners to "render service to the veterans of said county" and are paid from county funds. Ind. Code § 10-5-1-11. Although the statue describing county VSOs does not specifically delineate the meaning of the phrase, "render service to the veterans," the section creating the Department of Veterans' Affairs states that officers of the department including county VSOs,

> shall have full power and authority to do such acts at the request of any veteran of the armed forces, or his or her spouse, surviving spouse or dependents, which shall be necessary or reasonably incident to obtaining or endeavoring to obtain for the [veteran, spouse, or dependent] any advantage, benefit or emolument accruing, due or believed to be accruing or due to such person under any law of the United States, the state of Indiana or any other state . . . by reason of the service of such veteran in the armed forces of the United States.

Ind. Code § 10-5-1-3. County VSOs must have the same qualifications and adhere to the same rules and regulations as members of the state Department of Veterans' Affairs. They are supervised by the state Director of Veterans' Affairs. *Id.* The commisioners' decision of whether to employ a county VSO and how to fund the position is discretionary. Ind. Code § 10-5-1-11. The VSO, in turn, is invested with discretion in the use of the county's funds once appropriated.

Having outlined the powers of a VSO, we turn to the law at the time of the defendants' decision to determine whether it was clearly established that a government employee in Pounds's position could not be fired for political reasons. As Justice Scalia observed in his dissent in *Rutan, supra*, the law governing patronage dismissals after *Branti* is almost incurably vague. 'What [the *Branti* standard] means is any-

body's guess . . . [I]nterpretations of *Branti* are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissable requirement until a court renders its decision." *Rutan*, ____ U.S. at _____ 1110 S. Ct. at 2756; *see also Upton*, 930 F.2d at 1213 ("between the strictly menial government worker . . .and the policymaker/confidential assistant . . . there is a range of government positions for which the propriety of patronage firing has depended largely on the courts' juggling of competing constitutional and political values."); *Meeks v. Grimes*, 779 F.2d 417, 419 (7th Cir. 1985) "the problems faced by the courts in applying the [*Elrod/Branti*] formulation have become increasingly intractable.") The difficulty officials face in predicting whether a certain position is a proper target for political hiring and firing is the natural result of the myriad of governmental bodies, departments, and positions, and the varying responsibilities of public employees. *Meeks*, 779 F.2d at 419. Indeed, it is difficult to imagine how any plaintiff, under *Anderson*, could have a clearly established right to be free from patronage dismissal unless a nearly identical case had already been decided. *Cf. Greenberg v. Kmetko*, 992 F.2d 382, 385-86 (7th Circ. 1991) (Cudahy, J., concurring) "[T]he law of qualified immunity, as it has developed in this circuit, has tended to find qualified immunity in almost any case of first impression.")

This state of affairs injures both sides. A plaintiff has little chance of winning a case of first impression unless she occupies an extremely high or low rung on the bureaucratic ladder. *E.g., Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985) (second-highest official in Chicago Water Department subject to patronage dismissal because he helped establish and implement policies for allocating water—a sometimes testy political issue); *Meeks*, 779 F.2d at 420-21 (court bailiffs not subject to political dismissal because they did not set policy or have access to confidential information). By the same token, though, government officials are hard-pressed to predict who can be replaced for political reasons, and so may be dissuaded from reaping the full benefit of their victory at the polls and rewarding loyal supporters. Faced with such

uncertainty, it may be preferable to err on the side of caution and it might be well to find qualified immunity where we cannot confidently state that the right was clearly established or that the officials must have known their acts were proscribed by law. This is in line with the general principle that "public officials are entitled to immunity unless it has been authoritatively decided that certain conduct is forbidden." *Alliance to End Repression v. City of Chicago,* 820 F.2d 873, 875 (7th Cir. 1987).

Furthermore, Pounds had the burden to find closely analogous cases showing that his right was clearly established and has failed to do so. *Upton,* 930 F.2d at 1212; *Rakovich,* 850 F.2d at 1209. In fact, the only decisions concerning local VSOs (or their functional equivalent) are cited by the defendants. *Savage v. Gorski,* 850 F.2d 64 (2d Cir. 1988), a New York case, involved the First Deputy Service Officer of the County Veterans' Service Agency. The court held that the defendant County Executive could fire the officer for political reasons because his high salary, his contact with the public and veterans' organizations, and his power to interview veterans to determine their eleigibility for benefits all indicated that he could effect the implementation of the executive's policies, and so a shared ideology was a legitimate job requirement. *Id.* at 69. In *Wagner v. Hawkins,* 634 F. Supp. 751 (W.D. Ark. 1986) the chief executive officer of the county fired the VSO for political reasons. The court held that the chief executive was immune from liability for this action because the VSO met frequently with veterans concerning benefits issues and set goals and implemented policies with the chief executive's guidance, but primarily on his own. The court found that the VSO related to the county's chief executive much as a cabinet member relates to the governor, and therefore politics could be his undoing. *Id.* at 754.

The defendants claim these cases establish that the law in 1989 allowed them to reasonably believe they could appoint a new VSO based on ideology alone. After all, Pounds consulted with veterans and their families concerning benefits, filed reports with the commission, and essentially set his own goals and policies, some of which could be at variance with

those of the commissioners. In other words, he held a position where there was room for "principled disagreement on goals or their implementation" and thus was terminable under *Nekolny*. 653 F.2d at 1170. Pounds, however, maintains that these cases are irrelevant because New York and Arkansas have different statutory schemes than Indiana. This is true of *Wagner*, where the county executive set policies for the VSO and directly supervised him. The facts in *Savage*, however, are fairly analogous to those in the instant case. *Savage* involved New York law, which states that county VSOs serve at the pleasure of the county executive, but report to the state Veterans' Service Agency, N.Y. Executive Law, §§ 357 and 358 (McKinney 1981). This is identical to the situation in Indiana, where the defendants appointed Pounds but he answered to state officials. Moreover, the primary duty of New York VSOs is to assist veterans in their county in obtaining available benefits, education or rehabilitation. *Id.* Pounds did the same. Pounds, then, had much in common with the official in *Savage*, and the Second Circuit held that the VSO there was subject to patronage dismissal even though he actually implemented the policies of state officials rather than the county executive. Though the *Savage* court did not offer a lengthy explanation for its decision, the logical rationale is that the VSOs discretionary choices concerning the budget and office policy could reflect on the executive and even run counter to the executive's broad objectives or goals for the county, or the executive's policy as to how and when, and for what, county funds should be spent. In such circumstances, the executive could logically believe that it was important that the VSO share the same political outlook. *See Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) (suggesting that an official can consider the politics of appointees, even when those appointees, e.g. a judge or a member of the FTC, will be independent of the official once ensconced in office); *Tomczak*, 765 F.2d at 641 (noting that provision of public services is often an election issue, and therefore an elected official with specific policies on the subject is entitled to pick employees with the same views where these employees have some autonomy in expanding or implementing the policy).

Thus, *Savage* allows us to answer the key question in qualified immunity cases: Given the particular facts and the existing law, could the defendants reasonably have believed that their actions would not violate the plaintiff's rights? The answer here is yes. County VSOs in Indiana report to state officials and follow their policies, but they also must look to the county commissioners for funding, office space, and, most importantly, appointment. Moreover, county VSOs provide aid to local veterans, and it is possible that someone running for the elected position of commissioner could make promises to the public, and in particular the veterans, as to how the allocated funds will be used in social programs. When elected, the commissioner has every reason to believe that the only way to fulfill these promises is to appoint a VSO with a similar ideology. The law in 1989 did not clearly forbid such an act; *Savage* indicated that it was allowable, and cases from this circuit stated that anyone who played a significant role in setting or implementing policy could be fired for politics. *Nekolny*, 653 F.2d at 1170. Thus, the contours of the right to be free from politically motivated employment decisions were not so definite in 1989 as to make the unlawfulness of the defendants' acts apparent, and we therefore hold that Griepenstroh, Barclay, and Lubbehusen are entitled to qualified immunity under *Harlow and Anderson*.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

LARRY POUNDS	)
Plaintiff	)
	)
vs.	) CAUSE NO. EV 89-35-C
	)
DAVID GRIEPENSTROH,	)
HUGH BARCLAY, LOUIS	)
LUBBENHUSEN, SPENCER	)
COUNTY, INDIANA	)
Defendants	)

ORDER

This matter comes before the Court upon Defendants' Motion for Summary Judgment.

The Court, being duly advised of the premises, hereby DENIES the Defendants' Motion for Summary Judgment.

IT IS SO ORDERED this *27th* day of *June*, 1991 at Evansville, Indiana.

S/ Gene E. Brooks

Gene E. Brooks, Chief Judge
U.S. District Court
Southern District of Indiana

cc: All counsel of record

MEMORANDUM

This matter comes before the Court upon Defendants' Motion for Summary Judgment. The plaintiff alleges that he was not reappointed "by virtue of the defendants' desire to place a Democrat as Veterans Service Officer and plaintiff's non-participation in the Democratic election process." (Complaint at 2). The defendants claim in this Motion for Summary Judgment that they should be accorded qualified immunity.

A non-policymaking, non-confidential public employee cannot be fired upon the sole ground of political beliefs. A policymaking or confidential employee can be fired on political grounds without violating the First Amendment. *Elrod v. Burns,* 427 U.S. 347 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980).

The plaintiff feels he was a non-policymaking employee and thus could not be fired for his political beliefs. The defendants do not admit Pounds was terminated for political reasons, rather he was terminated for other reasons – but believe in any case that Pounds was in a policymaking position and thus was excepted from the *Elrod* rule.

In determining whether a position falls under the protection of the *Elrod* rule, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position, rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *Branti* at 518. In order to make this determination, the Court must look at the nature of Pound's position.

A County Veteran's Service Officer "shall serve under the supervision of the Veterans' State Service Officer." IC 10-5-1-11 (1988). The County Veterans' Service Officer is not supervised by the County Commissioners who appoint him, but by the Veterans' State Service Officer. Therefore, party affiliation with the County Commissioners could not be necessary or appropriate to the performance of his duties. As the statue makes clear, party affiliation is not a necessary requirement for the effective performance of a County Veterans'

Service Officer. Defendants argue[1] the Spencer County Commissioners voted on 21 March 1983 to require the Veterans' Service Officer to maintain office hours from 8 to 4 and to present a monthly report. The Commissioners also discussed referring calls to the Auditor when he was out of the office. None of these activities require party affiliation for the effective performance of the position. The office hours and phone referrals are purely administrative issues; the reports merely evidence the Commissioners desire to be informed, they do not provide the Commissioners with any substantive authority over the performance of the duties of the Veterans' Service Officer.

Finally, defendants' argument that Pounds thought the Veterans' Service Officer position might be utilized for political purposes does not demonstrate the political affiliation was an appropriate requirement for the position. Neither do any of the other activities[2] argued by the defendants support this conclusion. The defendants are not entitled to qualified immunity.

The defendants indicate that even if the Court finds qualified immunity is not present in this case, it is their belief that they are entitled to summary judgment because the plaintiff

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[1] Defendants also argue this is a confidential position. Defendants misstate the concept of confidentiality: The confidences here are with the veterans served, not the Commissioners.

Defendants miscite *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) as defining "confidential position". The quoted passage, without a pinpoint cite, is part of the explanation of a policymaker.

[2] Defendants enumerate as other activities: changing office hours, transporting veterans to hospitals for payment contrary to State policy, nursing home visits, submitting a budget, transferring funds between accounts, exercising control over space in the courthouse, and setting annual goals.

has failed to meet an initial burden that his political affiliation was a substantial or motivating factor in the decision to terminate him. In *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977), the Supreme Court stated:

> Initially in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "subatantial factor", or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board has shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Mt. Healthy at 287 (footnote omitted). Therefore, Pounds has the initial burden of showing that his political affiliation was a substantial factor for his discharge.

Pounds states in his deposition:

> I said I was unaware until December 27th that there was any consideration of replacing me for any reason, and I asked the commissioners then, I said, "Do you have any complaints on me or reasons? Have you been told by anybody, had any one complaint, that I'm not properly doing my job, Mr. Barclay," and he said, "No, in fact I've had a lot of good comments on you." I said, "Mr. Griepenstroh, have you had any complaints," and he said, "No." I asked Mr. Lubbehusen and he said, "No." My answer to that was–and they kind of smiled–all three of them had smiles on their faces at the time they said it–I said, "In other words, the reason for relieving me must be a hundred and ten percent politics." I believe it

> was Mr. Lubbehusen who said, "Yes, you're a big boy, you ought to understand that."

Deposition of Larry Gilbert Pounds at 148. These statements are sufficient to meet the plaintiff's initial burden. After the plaintiff has met his initial burden, the Court must look at whether the Board has shown by a preponderance of the evidence that Pounds would have been terminated regardless of his political affiliation. The Court feels that while there does exist some evidence in the record that Pounds may have been terminated regardless of his political affiliation, the evidence does not rise to the level for the Court to find this as a matter of law. This determination must be made by the trier of fact.

The Court, for the reasons set forth above, hereby DENIES the defendants' Motion for Summary Judgment.

IT IS SO ORDERED this *27th* day of *June,* 1991 at Evansville, Indiana.

S/ Gene E. Brooks

Gene E. Brooks, Chief Judge
U.S. District Court
Southern District of Indiana

cc: All counsel of record

(2)

Supreme Court, U.S.
FILED
JAN 4 1993
OFFICE OF THE CLERK

No. 92-795

In The

Supreme Court of the United States

October Term, 1992

LARRY POUNDS,

Petitioner,

vs.

DAVID GRIEPENSTROH, HUGH BARCLAY, and SPENCER COUNTY, INDIANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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73PP

QUESTIONS PRESENTED

1. Is the United States Court of Appeals for the Seventh Circuit in conflict with the decision of the Supreme Court in *Anderson vs. Creighton*, 483 U.S. 635 (1987), and in conflict with other federal courts of appeals, by holding that a constitutional right is not "clearly established" unless a nearly identical case has been decided, and by granting qualified immunity in practically every case of first impression to officials who violate constitutional rights?

2. Is the United States Court of Appeals for the Seventh Circuit, by focusing its inquiry in patronage dismissal cases on the potential of the public office in question to be politicized, even wrongfully, rather than on the legitimate public purpose of the office itself, in conflict with the decision of the Supreme Court in *Branti vs. Finkel*, 445 U.S. 507 (1980)?

3. Does the decision of the United States Court of Appeals for the Seventh Circuit, reversing the trial court, and granting qualified immunity to the defendants Commissioners of Spencer County, Indiana for the political discharge of County Veteran Service Officer, conflict with the decisions of the Supreme Court in *Anderson vs. Creighton*, 483 U.S. 635 (1987) and in *Branti vs. Finkel*, 445 U.S. 507 (1980)?

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STATEMENT OF THE CASE

On September 16, 1990, due to the resignation of Dallas Jones, the Board of Commissioners met to fill the vacancy for the Veteran's Service Officer. Plaintiff, Larry Pounds, was recommended to the Spencer County Board of Commissioners by the Rockport American Legion and Chrisney V.F.W. to fill the vacancy. However, a motion was made by one of the county commissioners to appoint Alfred Branch and he was chosen over the plaintiff to fill the unexpired term. (Resp. App. 1).

Several weeks later on October 6, 1980, a group of veterans appeared at the commissioners meeting, including Larry Pounds, among others, and they requested that a motion be made by the Board of Commissioners to specify that whenever an opening occurs for the position of Veteran's Service Officer, that time be given to fill the vacancy, and that each veteran organization, including the V.F.W. posts be notified so that they could present recommendations to the Board to fill the vacancy. This was put in the form of a motion and it was adopted by the Spencer County Commissioners. (Resp. App. 3).

On December 31, 1980, two months later, the commissioners noted that they had received two applications for the position of Veteran's Service Officer, from Larry Pounds and Bill Trafton. Both individuals had been recommended by different V.F.W. and American Legion posts. Pounds was nominated at the December 31, 1980 commissioners' meeting, styled as the organizational meeting for 1981, and he was appointed as the Veteran's Service Officer for the up-coming year of 1981, by action of the Spencer County Commissioners. (Resp. App. 7, 8).

Pounds was appointed to the office for 1982 at the December, 1981 commissioners' meeting. (Resp. App. 9).

On September 7, 1982, Pounds resigned, effective September 1, 1982, as the Veteran's Service Officer for Spencer County, and in the commissioners' minutes of that date, it was noted that Commissioner Harlan reminded those present that the Board had previously acted to notify all legion organizations when a vacancy would occur before the Board of Commissioners would fill the position. At this meeting, a letter was presented from Rockport American Legion, Post #254 recommending that Roland Bretz fill the unexpired term of Larry Pounds, and this was approved by the Board of Commissioners. It was specifically noted that the unexpired term of Larry Pounds, "which expires December 31, 1982," would be filled by Bretz. (Resp. App. 12).

On December 27, 1982, the commissioners reappointed Roland Bretz as the Veteran's Service Officer for the year 1983. (Resp. App. 17). This one year appointment was again done in advance of the calendar year 1983.

However, five weeks later, Bretz resigned as Veteran's Service Officer and the Spencer County Commissioners voted on February 7, 1983, to accept his resignation effective March 1, 1983. (Resp. App. 19).

At the Spencer County Commissioners' meeting of March 7, 1983, five individuals were recommended by Rockport American Legion Post #254 to fill the vacancy of the Veteran's Service Officer created by the resignation of Roland Bretz. The five recommended were: Larry Pounds, John Garrett, Bob Richard, Paul Lehr and William Rininger. Larry Pounds inquired if the appointment would be made that day. (Resp. App. 24). The president of the Board of Commissioners, Joe Harlan, reported to

two of the aspirants, Bob Richard and Larry Pounds, that since there were only two commissioners present and they were in disagreement over whom to appoint, that the decision would have to be tabled until March 21, 1983. (Resp. App. 25).

On March 21, 1983, the commissioners received a letter from Mr. Richard in which he withdrew his application to fill this vacancy, thereby leaving four individuals in the running for the position. Pounds was subsequently appointed to fill the unexpired term of Roland Bretz, effective March 21, 1983. It was also noted that the commissioners required two "stipulations" to this appointment. The first was that the Veteran's Service Officer would maintain the hours of 8:00 a.m. to 4:00 p.m., and the second was that he would present a monthly report to the Board of Commissioners. There was also discussion that when the Veteran's Service Officer was away from the office, that he would have someone substitute in his place. It was agreed that the County Veteran's Service Officer would give the County Auditor's phone number to the public whenever he was gone. (Resp. App. 28).

On January 3, 1984, the Spencer County Commissioners considered the applications of John Garrett and Larry Pounds for Veteran's Service Officer of that calendar year. Both applicants had been endorsed by various legion members. It was decided to contact the various legion posts to make one or more recommendations to the commissioners prior to February 6, on this appointment. It was noted that Larry Pounds would continue as Veteran's Service Officer until February 6, 1984, when a further decision would be made between Garrett and Pounds. (Resp. App. 32).

On February 6, 1984, John Garrett withdrew his application for Veteran's Service Officer and Pounds was then reappointed for the remainder of 1984. (Resp. App. 36).

On January 7, 1985, Pounds was appointed as Veteran's Service Officer for calendar year 1985. (Resp. App. 37).

On December 16, 1985, Pounds was appointed as Veteran's Service Officer for one year, for the calendar year of 1986. (Resp. App. 40).

On January 2, 1987, Pounds was appointed as Veteran's Service Officer for one year by the Spencer County Board of Commissioners. (Resp. App. 43).

On December 21, 1987, Pounds was appointed for calendar year 1988 to a one-year term as Veteran's Service Officer. (Resp. App. 46).

On December 27, 1988, Spencer County Auditor Dorothy Beckman presented to the president of the Spencer County Board of Commissioners, James Wetzel, a letter from Veteran's Service Officer Larry Pounds. (Resp. App. 50). The letter thanked the Board of Commissioners for appointing Pounds as Veteran's Service Officer "this year," and he stated that, "I look forward to serving you in 1989." (Resp. App. 52). The commissioners at the December 27, 1988 meeting were James Wetzel, William Scherer and Hugh Barclay (a respondent herein). No action was taken at that meeting to re-appoint Pounds to this post for calendar year 1989.

On January 3, 1989, two newly elected commissioners, Louis Lubbenhusen and David Griepenstroh joined

Hugh Barclay on the county commission. At this meeting, a motion was made to appoint Don Patmore as Veteran's Service Officer, and the motion carried. (Resp. App. 56).

Contrary to the Petitioner's claim that he was told by one of the Commissioners that the decision to replace him was "110% politics," this question was allegedly put to the Board as formulated by Larry Pounds. Petitioner has alleged that he received an affirmative response.

The resulting litigation ensued.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH *ANDERSON VS. CREIGHTON* AND THE GRANTING OF QUALIFIED IMMUNITY IN THIS CASE WAS PROPERLY DECIDED BY A REVIEW OF CLOSELY ANALOGOUS CASES THAT SHOWED THE APPELLANT HAD NO CLEARLY ESTABLISHED RIGHT TO THE RETENTION OF HIS ANNUALLY APPOINTED OFFICE.

Anderson vs. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987), held that a clearly established standard should not be applied on a level of generality that would bear no relation to the objective reasonableness test set forth in *Harlow vs. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982) and required that the contours of the right must be sufficiently clear so that a reasonable official would understand that he was violating that right.

Anderson vs. Creighton held that if an F.B.I. agent believed reasonably, although mistakenly, that probable cause and exigent circumstances were present, then the agent could not be held personally liable. *Anderson* was not an employment retention case in any way similar to the case at bar.

The broad parameters which this Court has issued in these types of employment cases come from the trilogy of *Elrod vs. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976); *Branti vs. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980) and *Rutan vs. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729 (1990).

However, the only reported cases in 1989 involving the termination of a veteran service officer that were clearly analogous are *Savage vs. Gorski*, 850 F.2d 65 (2d. Cir., 1988), *Wagner vs. Hawkins*, 634 F.Supp. 751 (W. D. Ark., 1986).

Both the Second Circuit and the district court in Arkansas both held that local county veteran service officers could be fired for political reasons.

It is submitted that the appellant, Larry Pounds, did not carry his burden either at the district court level or at the appellate level to show that there were any clearly analogous cases that held to the contrary to put the Commissioners on notice that failure to re-appoint Pounds was a violation of the law.

II. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS DID NOT REACH NOR ANSWER THE QUESTION THAT A VETERANS SERVICE OFFICER IN INDIANA COULD BE FIRED SOLELY FOR POLITICAL REASONS AND THUS DID NOT FOCUS ITS INQUIRY BEYOND, NOR CONFLICT WITH, THE DECISION IN *BRANTI VS. FINKEL.*

The only decision reached by the Seventh Circuit Court of Appeals was to grant qualified immunity to the Board of Commissioners of Spencer County, who were also sued individually, in their personal capacities.

Whether a Veteran Service officer in Indiana holds a politically sensitive position, subject, theoretically, to a politically motivated discharge, because such a position is one which dictates political loyalty, was answered in the negative by the district court, but the Seventh Circuit did not focus its decision into this inquiry.

In *Siegert vs. Gilley*, ___ U.S. ___, 111 S.Ct. 1789 (1991), the rationale for granting qualified immunity was reiterated by requiring any right allegedly violated to have been clearly established at the time of the officials' action. This Court noted that at the time a defendant acts, a determination of whether the plaintiff has asserted a violation of a constitutional right at all must also be inquired into.

It is submitted that Pounds has failed to actually allege any violation of any federal constitutional right. Although in *Elrod*, this Court held that patronage dismissals are in large part circumscribed by the First Amendment, this Court later held that both patronage

hiring or firing may be practiced if political affiliation is an appropriate requirement for the effective performance of a public office involved. *Branti*, 445 U.S. at 518, 100 S.Ct. at 1295.

The theoretical basis for this exception to the rule against patronage is the role that political affiliation and party loyalty are said to play in securing a representative government.

> Thus, "if any employee's private, political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the state's vital interest in maintaining governmental effectiveness and efficiency. *Branti*, 445 U.S. at 517, 100 S.Ct. at 1294 (citing *Elrod*, 427 U.S. at 366, 96 S.Ct. at 2686).

While Justice Brennan's prior plurality opinion in *Elrod* had, in fact, rejected "governmental effectiveness and efficiency", as a rationale for patronage dismissals, *see Elrod*, 427 U.S. at 366, 96 S.Ct. at 2686, this Court found legitimate justification that could save some aspects of patronage from constitutional infirmity, stating:

> "The need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. *Id.* 427 U.S. at 367, 96 S.Ct. at 2687.

Following the requirements of this court in *Siegert*, the line of inquiry in this case may be formulated as the following:

> Did Mr. Pounds official position give him broad responsibilities and place him in a position in which he could seriously threaten the goals of the appointive party, the Board of Commissioners?

The opportunity Mr. Pounds had in his position to affect and, if so inclined, to obstruct, the final dispensing of services makes the position of a Veteran Service officer a politically sensitive one for which party affiliation is a permissible criteria for the appointive authority to consider. This is in line with the Court's criteria in *Elrod*. The Court did not deviate from this admonition in *Branti*.

The appellant inappropriately characterizes the employee to be a mid-level public officer. Pounds' position was as the chief veteran service officer of Spencer County, Indiana. This office is subject to appointment by the Board of Commissioners of that county. Under I.C. 10-5-1-11, the county officer serves under the "supervision" of the Director of Veteran's Affairs, a political appointee of the Governor of the State. This is not a mid-level position, but rather the highest veteran official in the county. Pounds himself acknowledged that, on his own initiative, he implemented plans and policies which entailed changing office hours, transporting veterans to hospitals for payment (contrary to state policy), conducting of nursing home visits, submitting a budget, transferring funds between accounts, exercising control over space in the courthouse and setting annual goals for the

office. The Seventh Circuit Court of Appeals found that in such circumstances, the executive could logically believe that it was important that the veteran service officer share the same political outlook as the Board which appointed him to this county courthouse row office.

In December, 1988 Pounds asked the Spencer County Board of Commissioners, the majority of whom shared Pounds' same political party affiliation, to re-appoint him for calendar year 1989, as had been their previous custom. They rejected his request, giving the in-coming, newly elected board members their own opportunity to appoint someone whom Spencer County veteran's groups endorsed.

There is no argument that perhaps Larry Pounds and the Board of Commissioners of Spencer County shared the same goal to assist veterans to gain access to entitlement. But how these goals are to be achieved may be disputable. When a chief official in a county courthouse has broadly defined responsibilities, this is indicative of a policy-making position. Thus, the implementation of his plans can thwart the appointive body's policies and goals. Elections often turn on the success or failure of the incumbent to provide services. It is a fact of political life that governmental resources are not limitless. An individual who has authority over the ultimate allocation of governmental services can have, and does have, an important and daily impact on the voters. The types of policies and plans and degree of responsiveness taken by a Veteran Service Officer reflects on the appointive body and thus, Pounds held an important appointed political office. *Elrod* established that an office holder with policy-

making power does not have a constitutional right to be in a position to thwart the goals of the in-party. *Elrod*, 427 U.S. at 367, 96 S.Ct. at 2687.

III. A VETERAN SERVICE OFFICER WAS NOT A MID-LEVEL PUBLIC OFFICIAL VICTIMIZED BY WRONGFUL TERMINATION BECAUSE OF POLITICAL PATRONAGE AND THE SEVENTH CIRCUIT DECISION IS NOT IN CONFLICT WITH ESTABLISHED PRECEDENTS.

The incoming and newly elected Spencer County Board of Commissioners, in compliance with a mandate of voters properly followed the trilogy of *Elrod*, *Branti*, and *Rutan*, when they appointed another applicant to the position as the Spencer County Veteran's Service Officer after Larry Pounds' term of appointment had ceased. The Seventh Circuit followed the most reasonable approach in the area of qualified immunity, i.e., to review closely analogous cases involving a Veteran's Service Officer's termination. Had there been no reported analogous cases in existence, perhaps an intractable problem would have been faced by the courts. However, Pounds acted autonomously as a policy maker in a position able to thwart the officials who appointed him on an annual basis.

CONCLUSION

The decision below is well substantiated by the facts and the application of the law. This petition should be rejected. The Seventh Circuit Court of Appeals should be upheld.

Respectfully submitted,

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Counsel for Respondents

January 4, 1993

RESPONDENT'S APPENDIX

Defendant's Exhibit 28

COMMISSIONERS SPECIAL MEETING

September 16, 1980

The Board of Spencer Co. Commissioners met to fill the vacancy of Veteran Service Officer due to the resignation on September 15, 1980 of Dallas Jones.

The meeting was called to order by President Schue with all members present. The resignation of Dallas Jones as Veteran Service Officer effective September 15, 1980 was read by President Schue. Also present was Jerry Hargis from the Journal-Democrat.

The floor was opened for recommendations to fill the vacancy. The resume of Larry Pounds was presented to the Board by Commissioner Harlen. A group of Veterans representing Rockport American Legion and Chrisney VFW with Allen Titus as spokesman recommended Larry Pounds to fill the vacancy. Mr. Titus stated that in the past the Commissioners had worked with the Legion in appointing a person that would fulfill the needs of the Veterans of the County. Mr. Titus further stated that a disabled veteran if qualified, should hold the position.

A motion was made by Adrian Pund to appoint Alfred Branch. Second by Jerry Schue. Commissioner Harlen abstained from voting.

Members present representing Veteran Organizations were: Marvin Hamilton, James Beckort, Paul Bingle, Tom Fleischman, Larry Pounds, Charley Roberts, Allen Titus and Bob Walker.

Meeting adjourned at 7:00 P.M.

BOARD OF COMMISSIONERS

/s/ Jim Schue

/s/ Joe Harlen

/s/ Adrian Pund

Attest: /s/ Mary E. Haaff
Mary E. Haaff, Auditor

Defendant's Exhibit 29

COMMISSIONERS MEETING

October 6, 1980

The meeting was called to order at 8:15 A.M. with all members present. Also present was County Attorney, Lueken. Minutes of September 2, 5, 16 and 29th were approved as read.

VETERAN SERVICE OFFICER

A group of veterans were present and requested a motion be made by the Board and made part of minutes that when an opening occurs for the position of Veteran Service Officer that time be given to fill the vacancy and that each veteran organization, including VFW posts be notified so that they may present recommendations to the Board to fill the vacancy. Joe Harlen made the motion with a second by Adrian Pund. All in favor. Veterans present were: Larry Pounds, Jim Yellig, Rich Wilkerson, Lloyd Vincent Jr, Paul Bingle, Bill Parm and Marvin Hamilton.

SPECIFICATIONS – (Co. Books, Stationery and Printing)

Specifications for supplying the County with books, stationery and printing for 1981 was approved by the Board. The Auditor was instructed to advertise for bids for opening on December 1.

JAIL INMATE – (Susie M. Cram)

Attorney Leuken presented a letter from Attorney Ronald M. Sullivan representing Owensboro-Daviess County Hospital regarding payment of Ms. Cram's hospital stay while she was an inmate of the County Jail. Attorney Leuken advised the Board that he responded to the letter of Attorney Sullivan requesting an itemized claim which has to be submitted before payment could be considered by the Board. Leuken also presented a letter from Attorney Sullivan stating he had forwarded Attorney Leuken's letter to the hospital and requested them to forward the requested information to the Board. The Sheriff was directed to make the necessary transfer of funds within the Jail Budget for the Boards consideration of payment.

WILLOW POND ROAD – (Bridge on Co. Road 300N)

The Auditor was instructed by the Board to void check #9890 payable to Chapman and McCoy Drainage Co. in the amount of $2,492.50 until restitution was [sic] to the County for damage done by a dragline operated by Mr. McCoy to this bridge.

COMMUNITY DEVELOPMENT BLOCK GRANT – (St. Meinrad Community Center)

Certificate of Completion was signed by Board President Schue on the above project.

HUD – (Projects 1981)

Gary Walton of Indiana 15 Regional was present and explained the various programs available for Spencer County for 1981. The Auditor was instructed to advertise the 2 public hearing notices to allow citizens of the County an opportunity to express their preferences on program activities: The first hearing will be held on October 20, 1980 at 7:00 P.M. at the Spencer County 4-H Association Inc., Junction 70 & 231, Chrisney, Indiana and the second hearing to be held same time and place on October 27, 1980.

STAMP MACHINES – (Pitney Bowes)

The office holders were called in for a demonstration of the automatic stamp machine presented by Bernhard Falk of Pitney Bowes. No action was taken by the Board at this time.

Defendant's Exhibit 30

COMMISSIONERS MEETING

(Organizational Meeting For 1981)

December 31, 1980

After the swearing in of Commissioners Alberta Knepper and James Wetzel they met in the Commissioners Room at 3:35 P.M. with Commissioner Joe Harlen for their organizational meeting with appointments to become effective January 1, 1981.

The first order of business was the appointment of *President* and *Vice President* of the *Board of Commissioners,* James Wetzel made the motion *Joe Harlen* be appointed *President* of the Board. Second by Alberta Knepper.

Alberta Knepper made the motion *James Wetzel* be appointed *Vice-President* of the Board. Second by Joe Harlen.

Alberta Knepper made the motion *Bruce Cissna* be appointed *County Attorney* with a second by James Wetzel. All in favor.

On a motion by James Wetzel and a second by Alberta Knepper, *John Hargis* was appointed *Drainage Board Attorney.* All in favor.

Leroy Meece was unanimously appointed as *County Home Superintendent* with a motion by James Wetzel and a second by Alberta Knepper.

Diane Meece was appointed *County Home Matron* on a motion by Joe Harlen and a second by James Wetzel. All in favor.

James Wetzel made the motion and a second by Alberta Knepper that *Elmer Gentry* be appointed *Sanitation Lead Man.* All in favor.

Joe Harlen made the motion and a second by Alberta Knepper that *Donald R. Clark* and *John Limp* be appointed the *two* remaining *Sanitation* positions. All in favor.

Herb Clark was appointed *Head Mechanic* on a motion by James Wetzel and a second by Alberta Knepper. All in favor.

Joe Harlen made the motion *William Garrett* be appointed *1st District Foreman.* Second by Alberta Knepper. James Wetzel abstained.

Floyd Weatherholt was appointed *2nd District Foreman* on a motion by James Wetzel and a second by Alberta Knepper. All in favor.

Alberta Knepper made the motion *Earl Leistner* be appointed *3rd District Foreman.* Second by James Wetzel. All in favor.

President Harlen called for a motion on an appointment of a County Road Superintendent. He called a second and third time, there being no response to the request, said proposal is dead.

Commissioner Harlen stated that two applications had been received for the position of Veteran Service Officer, Larry Pounds and Bill Trafton. He further stated that Larry Pounds had been recommended by the membership of the American Legion, Rockport Post and the application of Bill Trafton had been presented by Bob Davis of the Dale Post. James Wetzel stated he had contacted the Dale Post and was informed that Bill Traftons

[sic] application was never brought before their membership for consideration. James Wetzel made the motion *Larry Pounds* be appointed *Veteran Service Officer.* Second by Joe Harlen. Alberta Knepper abstained.

Defendant's Exhibit 31

APPOINTMENTS (con't)

Commissioner Wetzel made the motion the following appointments be made to the *Board of Zoning Appeals*:

1 year term – Robert Mack
2 year term – Bill Temple
3 year term – Raymond Lynam
4 year term – Sandra Siddons
4 year term – Dave Hammer

Second by Knepper. All in favor.

Commissioner Wetzel made the motion to appoint the following positions for 1982.

President Board of Commissioners – Harlen
Vice President Board of Commissioners – Wetzel
President Drainage Board – Harlen
Vice President Drainage Board – Wetzel
County Attorney – Bruce Cissna
Drainage Board Attorney – John Hargis
Civil Defense Director – Tom Miller
Veteran Service Officer – Larry Pounds

Second by Knepper. All in favor

Wetzel made the motion *Elmer Gentry* be appointed *Sanitation Lead Man*. Second by Harlen. All in favor.

Knepper made the motion *Charlie Hall* be appointed *Head Mechanic*. Second by Harlen. All in favor.

On a motion by Wetzel and a second by Harlen *Bill Garrett* was appointed *District 1 Foreman*. All in favor

Floyd Weatherholt was appointed *District 2 Foreman* on a motion by Harlen and a second by Knepper. All in favor.

On a motion by Knepper and a second by Wetzel *Earl Leistner* was appointed *District 3 Foreman*. All in favor.

Commissioner Wetzel made the motion *Darrell Stephens* be appointed *Superintendent*. Second by Harlen citing Stephens experience as one of the reasons for appointing him. Commissioner Knepper abstained.

Commissioner Wetzel made the motion *Carol Champion* be appointed *Road Clerk*. Second by Knepper. Harlen voted in favor adding Carol had done an excellant [sic] job.

The Board set their second meeting of the month the third Monday.

EMERGENCY AMBULANCE (Civil Defense Bldg.)

Two bids were submitted for installing shower facilities at the Civil Defense Building for the use of the emergency ambulance service.

1. Dale Heating & Plumbing – $445.80
2. General Contracting & Home Building – $600.

Commissioner Knepper made the motion the low bid of Dale Heating & Plumbing for installing a 35" fiberglass shower stall and hot water be accepted. Second by Wetzel. All in favor.

COUNTY HOME – Ordinance 81-4 (Closing)

Attorney Cissna read aloud the Ordinance whereby the Commission [illegible] the County Home December 31, 1981.

Commissioner Knepper made the motion to adopt the Ordinance dis[illegible] Home December 31, 1981. Second by Wetzel. All in favor.

SALE OF COUNTY OWNED PROPERTY

The Commissioners approved the order to sell a surplus [illegible] Freezer, Serial #RT18165, Model #1V18TCW56 from [illegible].

Defendant's Exhibit 32

COMMISSIONERS MINUTES

September 7, 1982

The meeting was called to order at 9:00 A.M. with President Harlen and Commissioner Wetzel present.

Wetzel made the motion the minutes of August 16 be approved as read. Second by Harlen.

VETERAN SERVICE OFFICER

President Harlen read aloud the resignation of Larry Pounds as Veteran Service Officer effective September 1, and reminded those present he promised if the vacancy ever occured [sic] all legion organizations would be contacted before the post was filled. Haaff informed the Board Pounds turned in the office key August 27. Marvin Hamilton presented a letter endorsed by Paul Lehr, Commander of Post #254 whereby their membership recommended Roland Bretz fill the vacancy. He stated Larry Pounds had forwarded a letter to all Veteran organizations to present their recommendation to the Board. With no other recommendations presented Wetzel made the motion Roland Bretz fill the unexpired term of Larry Pounds which expires December 31, 1982. Second by Harlen.

President Harlen made the motion Larry Pounds be reimbursed up to four days if he were available to help Mr. Bretz get organized. Second by Wetzel.

CIVIL DEFENSE DIRECTOR

Curtis King from the New Boston Fire Department recommended Harold Purviance as Civil Defense Director. President Harlen stated he had contacted Purviance and he was not interested in the job and there were three other people who have shown an interest. The Board agreed since an emergency might arise they would not accept the resignation of Tom Miller until a replacement had been found.

SPENCER COAL COMPANY, INC. (1600N. .5 mi.)

The Auditor was requested to forward a certified letter to the bonding company stating Spencer Coal Comapny [sic], Inc. has not fulfilled their responsibilities and obligations on repairs of County Road 1600 N., .5 mi. and steps will be taken to forfeit the bond if immediate action is not taken to eliminate the problem. A copy is to be forwarded to Spencer Coal.

President Harlen stated he would like a verification of the intentions of Spencer Coal to pay the county delinquent taxes owed as in two years they are not filing bankruptcy again.

Commissioner Knepper stated the owners are out of state and so are the employees. The company is taking the resources out but is not willing to pay their taxes and if the company wanted co-operation from the Commissioners they would have to pay taxes and keep roads fixed.

She stated since the company filed a chapter 11 she doubted the county had any authority to collect the back taxes.

Jeff Garrison representing Spencer Coal stated County Road 1600N was being repaired. He was not sure why the delinquent taxes were never paid. The company is under new management and Chapter 11 was suppose to elliviate [sic] any past debts with the county.

He informed the Board the company plans to make up the back taxes and make good all debts.

Harlen informed Garrison the company needs to repair 1600N so Wetzel can inspect it.

The application of Spencer Coal on *1000 N commencing at intersection of 245 and 1000N, thence W. on 1000N, a distance of 1¾ mi. in Hammond Twp.* was presented to the Board.

Commissioner Knepper stated she would not approve any more road bonding until a list of equipment and serial numbers were presented to the proper officials.

President Harlen informed Garrison 1600N needed repaired and a written plan on payment of the delinquent taxes needs to be presented to the Board.

Garrison stated the company is working on a repayment plan with the bankruptcy Judge.

Treasurer Neuhoff stated all the company would have to do is file a petition with the Bankruptcy Judge asking that the company pay the debt which is the procedure they used recently to purchase a piece of equipment.

Attorney Cissna informed the Board they had to treat Spencer Coal as a new company since they filed bankruptcy and no restrictions could be placed upon them because they are in Chapter 11. If the Board did they would have to treat other companies the same.

COURTHOUSE BOILER

Attorney Cissna with Engineer Phillip Grounds began opening bids of the [illegible] Courthouse.

Defendant's Exhibit 1

Commissioners December 27, 1982 (con't)

COURTHOUSE ROOF

The Auditor was requested to forward letters to area roofers of the Board's intention to renovate the courthouse roof in 1983 and if interested, to contact President Harlen for more information.

BONDS

The Board approved the official bonds of *John A. Hargis* and *Eric K. Ayer,* Prosecutors Office. The new bonds are for the minimum of $8,500, as set out in the statute.

The Board approved the Bond of Edward Beren, Grass Township Trustee.

The Board approved the contract bond of Stallings and Young Excavating on Bridge #165.

AMERICAN DISPOSAL (County Landfill)

Haaff was requested to inform Attorney Cissna to forward a letter to Charles Brown, President of American Disposal & Mining Co., Inc. to attend the Board's January 3 meeting to discuss his company's 1983 contract with Spencer County which commences January 1, 1983.

The Auditor was requested to pay Warrick County monthly in the amount of $5,534.33 until further notice.

Haaff in formed [sic] the Board their appropriation was based on being able to use American's landfill at

$5,000, per month in 1983 and each month Warrick County is paid, it is $534.33 over the monthly appropriation.

APPOINTMENTS

Commissioners Wetzel made the motion *Sandra Siddons* be re-appointed to a one year term on the *Advisory Planning Commission*. Second by Knepper. All in favor.

Knepper made the motion *Kenneth Jones* replace Robert Mack on the *Zoning Appeals Board*. Second by Wetzel. All in favor.

Commissioner Wetzel made the motion to re-appoint the following positions for 1983:

Drainage Board Attorney – John Hargis
County Attorney – Bruce Cissna
Veteran Service Officer – Roland Brets [sic]
Sanitation Lead Man – Elmer Gentry
Superintendent – Darrell Stephens
Road Clerk – Carol Champion
Park and REcreation [sic]
Board Member – 2 year term beginning first Monday in January, 1983 – C.T. Grubb

Second by Knepper. All in favor.

Harlen made the motion *Paul D. Frank* replace Capt. Tom Miller as *Civil Defense Director*. Second by Knepper. All in favor.

Wetzel made the motion *James Kellams* be appointed *head mechanic*. Second by Knepper. Harlen abstained.

Commissioner Knepper made the motion *Neal Esarey* be appointed *Foreman of District 3.* Second by Wetzel. All in favor.

Wetzel made the motion to appoint *Joe Harlen, President of Board of Commissioners* and *President of Drainage Board.* Second by Knepper. Harlen abstained.

Knepper made the motion *Commissioner Wetzel* by appointed *Vice President, Board of Commissioners* and *Vice-President, Drainage Board.* Second by Harlen.

BRIDGE RE-INSPECTION

Haaff reported Steve Dilkes phoned to say the County should receive notice early in January from the Indiana Department of Highways to proceed with the bridge re-inspection.

PROCLAMATION (Agriculture Census)

Commissioner Wetzel made the motion to adopt the proclamation urging farm and ranch operators to fill out and return their farm questionaire [sic] to the Census Bureau. Second by Harlen. Knepper abstained.

Defendant's Exhibit 2

Commissioners Minutes February 7, 1983 con't

COURTHOUSE ROOF

Grounds informed the Board his estimate for insulating and reconst[illegible] roof was $45,000. This does not include repairing downspouts or the d[illegible] suggested the Board consider replacing the glass dome with fiberglass [illegible] heat loss.

FAMILY PLANNING

Harlen requested to Cindy Smith, Family Planning Nurse to screen recepients [sic] so it is not so easy to obtain free service. He also recommended local physicians be used to keep the money in the county. Mrs. Smith reported W-2's are required to substantiate incomes. Recepients [sic] must have a yearly check up in order to obtain pill renewal. Some have more check ups if infections are detected.

VETERAN SERVICE OFFICER

Knepper made the motion to accept the resignation of Roland Bretz as Veteran Service Officer effective March 1, 1983 or until a replacement is appointed. Second by Wetzel. All in favor.

APPOINTMENTS

Knepper made the motion *Commissioner Wetzel* be reappointed to a one year term to the *Indians 15 Regional Planning Commission*. Second by Harlen. All in favor.

Wetzel made the motion *Patsy Bates* be re-appointed to another one year term on the *Contractual Library Board*. Second by Knepper. All in favor.

BONDS

The official bonds of *Judith Moesner, Grass Twp. Trustee* and *Neal Esarey, Road Foreman* were approved by the board.

BID (Gas & Oil for the Sheriff's Department)

Attorney Cissna reported to the Board he has been trying to contact Attorney Wetherill to see if the assignment agreement of Tyler's Truck Stop, Inc. was prepared for board's consideration.

FAS ROUTES

Haaff informed the Board the Affirmative Action Program, Equal Opportunity Policy adopted by the Board in 1978 and the Current Employment Statistics were forwarded to the Indiana Department of Highways on January 18. Haaff was requested to contact the departeent [sic] to see if additional information was needed.

BARGER BRIDGE

Cissna reported Mr. Smitterman, Department of Highways informed him the engineering contract was not approved by the Federal Government prior to payment and therefore would not reimburse the State. The State now wants reimbursed from the County. Harlen informed

the Board, Wendel had a contract with the County and therefore did not forward the required reports to the State for reimbursement. The State is basing their fee at $10.00 per hour, therefore they are requesting a reimbursement in the amount of $7,036.44. After talking to Indiana Dept. of HIghways [sic] on the phone Harlen made the motion to approve the resolution to the audit prepared by the State on the engineering fee. Second by Wetzel. All in favor.

QUADRA, INC.

Attorney Cissna was instructed to contact Chrisney State Bank to see if Quadra had deposited $10,000, in escrow as requested by the Board. No consideration will be given to the agreement until the deposit is made.

LINCOLN HILLS

President Harlen reported Spencer County has received $22,000, for increased development of Job Training Centers and In/School Programs, during Oct. 1 thru Sept. 30 for CETA programs, $31,402, made available for additional training and $47,500, for the Summer Youth Program. The programs will be administered through Lincoln Hills.

Defendant's Exhibit 3, p. 1

Owensboro Municipal Utilities (con't)

Harlen stated before the Board would consider the agreement two conditions would have to be met.

1. The county will grade and the company will furnish rock, where designated. Up to $3,000 credit with Mulser for rock. We're going to reap a little out of it, but we're entitled to it. The county will grade and fill ruts already present.

2. C.D. with local bank.

Lindsey inquired of the alternatives, I&M's C.D. was with a bank in Fort Wayne and there is a penalty for redeeming the C.D. early. What if the company buys gravel in Kentucky? You are laying down conditions you can't enforce.

Harlen answered if the rock is bought in Kentucky it would take more rock and the Board could refuse use of the road.

Harlen inquired if the company would be willing to put $10,000, up front and the County would maintain the road.

Mr. Pace inquired if the Board would approve the agreement today contingent upon: 1. The Company put down up to $3,000, in rock, 2. Change the C.D. to a Spencer County Bank.

Wetzel stated Joe is setting terms at $3,000 to construct the transmission lines, if he were setting the terms $10,000, would be more feasible.

President Harlen made the motion to accept the agreement subject to the stipulations: 1. Up to $3,000 in letter of credit to Mulzer for rock submitted to the Auditor's Office and 2. C.D. made payable to Board of Commissioners and Utility Company. These are to be submitted by 9:30 A.M. on March 21. Second by Wetzel. Knepper abstained.

Harlen informed Mr. Pace the contractor needs to meet with him to view the roads. Mr. Howard stated when the contract is let, the contractor will be in touch.

FINANCE BOARD

Haaff presented a letter from Spencer County Bank whereby they request the deposits of the Treasurer. Haaff inquired if the Board would set another hearing to clarify the last meeting. The Clerk and Treasurer were advised by Harlen to continue with Farmers State Bank until another board meeting and then a letter from him stating as only one member of the Board he could not over-ride the decision of the Board and advised the two officials to begin March 1 depositing with the banks as approved. They received a letter from Knepper stating she understood the two officials were to continue depositing with Farmers State Bank until the next meeting of the Board. Knepper stated another meeting should be held to clarify the misunderstandings.

VETERAN SERVICE OFFICER

Harlen read aloud the recommendations of Post #254 – to fill the vacancy of Veteran Service Officer created by the resignation of Roland Bretz.

1. Larry Pounds
2. John Garrett
3. Bob Richard
4. Paul Lehr
5. William Rininger

The five recommended by the post submitted applications for the Board's consideration.

Commissioner Wetzel made the motion to table any action in order to proceed with bid letting scheduled at this time and to have an opportunity to study the applications. Second by Knepper. All in favor.

Larry Pounds inquired if the appointment would be made today. President Harlen stated yes, if there was time.

CUM. BRIDGE

The Board approved the Change Order on *Bridge #192, "over Chrisney Drain" on Base Rd.* for an additional 68 T. of compacted aggregate and 42.5 T. of rip-rap for a total of $1,181.50

Defendant's Exhibit 3, p. 2

Commissioners Minutes March 7, 1983 (con't)

VETERAN SERVICE OFFICER

President Harlen reported to Bob Richard and Larry Pounds since there were only two commissioners present and they were in disagreement on the appointment, the decision would have to be tabled until March 21 at 10:00 A.M. when Commissioner Knepper could be present.

WHITNEY CABLEVISION OF IND.

Ralph Cales came before the Board and requested a transfer of Robert Wall & Associates to Whitney Cablevision of Indiana.

The Board instructed Cales to present plans and specs and they would meet tomorrow at 1:30 P.M. for consideration.

Meeting adjourned at 3:10 P.M. to meet again March 10 at 1:00 P.M. for Finance Board Meeting.

Board of Commissioners,

/s/ Joe Harlen

/s/ James E. Wetzel

/s/ Alberta Knepper

ATTEST: /s/ Mary E. Haaff
Mary E. Haaff, Auditor

COMMISSIONERS MINUTES

March 21, 1983

The meeting was called to order with all members present.

Wetzel made the motion the minutes of March 7 be approved as read. Second by Harlen. All in favor.

EMERGENCY AMBULANCE

Haaff was requested to check if the Ambulance Service was covered by the types of insurance as listed in the agreement of the county and ambulance service.

ENTERPRISE DOCK COMPANY

Gerald Payne, an Enterprise resident, inquired of the uses of the coal dock that enterprise Dock Company was proposing to construct near Richland as published by the news media. Surveying is being performed. Harlen stated the Board had not been contacted by the company and upon investigation the company has'nt [sic] contacted the Zoning Administrator for zoning rules and regulations. The first the Commissioners were informed was by Public Notice received March 11 from the Army Corps of Engineers whereby Enterprise Dock Company had applied for an application to construct a commercial coal and grain loading facility on the Ohio River.

Don Schulte, area realtor, reported to the Board it would be a critical mistake to allow industry into the area because the area is prime residential real estate. When

people are interested in locating in the country they ask for something in the vacinity [sic] of Highway 66 South from Rockport to Hatfield.

Becky Hinton from the Journal-Democrat stated she had talked to D.L. Hawkins from Corps of Engineers and another gentlemen in charge of permits and they were unaware of any local zoning permits.

Defendant's Exhibit 4

COMMUNITY DEVELOPMENT BLOCK GRANT (Drainage Problems in Hatfield and Richland Areas)

The letter from Department of Commerce whereby they had completed is [sic] review and evaluation of the County Assistance Program application and find the proposed feasibility study did not meet the criteria required for funding was reviewed by the Board.

VETERAN SERVICE OFFICER

President Harlen read aloud the letter from Robert W. Richard, whereby the [sic] withdraws his application to fill the vacancy of Veteran Service Officer.

Harlen stated he would like to make three stipulations to the next appointment.

1. Hours 8:00 A.M. to 4:00 P.M. as other county offices.

2. When the officer takes a veteran to the hospital and is away from the office, he has someone to set in his place.

3. He presents a monthly report.

Larry Pounds state [sic] the veteran is screened pretty close to determine if there is a family member who can take the veteran to the hospital. Most of the Veteran's are WW1 and mentally ill and need someone to accompany them to fill out the necessary reports. If someone sets in the officer's place, they would not be able to help the veteran.

Haaff stated the Surveyor customarily reports to her when he is away and when he is expected to return to his office. Veteran Officers in the past have notified her when they will be gone.

President Harlen stated he would withdraw his stipulation someone need be present if the officer gives the Auditor's phone number as an alternative when he is gone.

Knepper made the motion Larry Pounds be appointed to fill the unexpired term of Roland Bretz effective March 21 at 12:00 P.M. The hours be 8:00 A.M. to 4:00 P.M. and a monthly report be presented. Second by Wetzel. All in favor.

BID LETTING (Sheriff's Car)

Haaff reminded the Board April 4 at 10:00 A.M. was the bid letting for a new car for the Sheriff's Office.

COURTHOUSE ROOF (Three I Engineering)

Thomas Solecki presented his firms [sic] resume and stated their primary business is located in Evansville. If the Board wants a built up roof he recommends full time inspection.

Harlen inquired if his firm would work on a percentage basis.

If periodic inspection, yes, but if fulltime inspection is required he would have to consult his superior because its normally based on an hourly rate. He asked if additional insulation would be required because most heat

escapes through the roof. A built up roof is comparable in price to single ply.

Knepper commented flat roofs seem to leak most frequently.

Solecki stated the roof has sufficient slope so that it shouldn't be a problem. He stated he received the letter whereby the board would be receiving proposals up until 10:30 A.M. on April 4 and wanted to get an idea of what the commissioners were wanting.

Wetzel stated the Board would maybe need three different specs and prices to consider.

Solecki stated the dome could be caulked or completely replaced, chimney needs to be replaced and anything not needed be done away with.

Harlen stated the Board is not experienced with the type work needed that is why they are seeking a licensed engineer.

The Board asked Mr. Solecki to return April 4 with his proposal.

INDIANA CITIES WATER CORPORATION

The Auditor was requested to forward a letter to this company that due to revision of the bonding ordinance a bond in the amount of $5,000, is required to replace the bond which expired March 15, 1984. Also the company is to contact President Harlen concerning maintenance on Cemetary [sic] Road which is unsatisfactory.

DEFENDANT'S EXHIBIT 5

COMMISSIONERS MINUTES

January 3, 1984

The meeting was called to order at 9:40 A.M. with Harlen and Knepper present. Wetzel was absent due to illness in the family.

Knepper made the motion to approve the minutes of December 13 and 19. Second by Harlan.

The minutes of December 27 were approved on a motion by Knepper and a second by Harlan with one correction – "The bid of Spencer County Co-op for oil and air filters was accepted "– should read – "The bid of Spencer County Co-op for oil filters and air filters was accepted".

COMMUNITY CORRECTIONS PROGRAMS

The Auditor was requested to forward a letter to Nancy D. Broglin, Supervisor, Work Release Services informing her the Board is interested in the applications and further information for funding through the Community Corrections Program.

WELFARE CLAIMS

Commissioner Knepper stated Welfare Director Bauman informed her Welfare claims when approved by State Welfare are audited and they deduct excessive costs such as T.V. and telephone from hospital bills of Welfare patients.

APPOINTMENTS

No action was taken on the appointment of Foreman, District #2 and Kenneth Tribbie is to continue as forman until a decision is made.

John Garrett, an applicant for Veteran Service Officer, inquired if a decision had been made on an appointment.

Harlen answered the Board has the applications of Garratt and Larry Pounds. Two of the legion members had endorsed both applicants. He doesn't think the Commissioners should be put in such a position. With members endorsing both applicants, the Board is not sure who the Legion is recommending:

Knepper stated if the same people sign both applications, the Board doesn't know what the Legion wants.

Harlen stated the reason the Legions are contacted is because in 1980, the Board was accused of not acting in the best interest of the veterans. Since then the different posts have been contacted.

Haaff was requested to forward a letter to James Masterson, Commander Post #254 that the Commissioners desire the Legion Post in Spencer County conduct meetings to make one or more recommendations to the Commissioners prior to February 6 at 10:30 a.m. on the appointment. Legion members are welcome to attend the February 6 meeting.

Larry Pounds will continue as Veteran Service Officer until February 6 when a decision will be made.

BIDS (Sheriff's Department)

The Auditor was requested to advertise for bids for a new car (cars) for the Sheriff's Department.

LINCOLN HILLS DEVELOPMENT CORPORATION
(Project Head Start)

The Board reviewed and approved the application of Lincoln Hills Development Corporation seeking federal funds for the Head Start program.

INDIANA 15 REGIONAL PLANNING COMMISSION

The Board reviewed and approved the application of Indiana 15 seeking funds in the amount of $55,000, so they may continue the Economic Development Planning Program.

DEFENDANT'S EXHIBIT 6

Commissioners Minutes February 6, 1984 (con't)

CUM. BRIDGE (Bridge #62 on Co. Rd. 75 E. over "Branch of Honey [illegible]

The Board approved the change order in the amount of $372 [illegible] aggregate, linear grading and wing extension for a total conce [illegible] of $19,857.75, also approved was George Wandel's claim reflec [illegible].

SPECIAL FUNDS (Bridge #248 and Co. Rd. 350 N., 75 E. & 400 N.) [illegible]

The board approved payment to Dade Construction Co., Inc. [illegible] $11,890, for *Bridge #248* and approved payment to George Wandel [illegible] $2,440, for *Co. Rd. 350 N., 75 E. & 400 N.*

COUNTY INSURANCE (Wm. Alvey, etal vs Board of Commissioners, a [illegible]

Robinson reviewed the letter from Western World and comme [illegible] couple of clauses where there could be possible coverage. He [illegible] with Berger and the Board whereby the letter will be one of the [illegible].

BIDS (Sheriff's Department)

Attorney Robinson began opening bids at 10:00 A.M. for [illegible] Sheriff's Department:

1. Parsley Brothers Chevrolet-Olds, Inc. – Two 1984 Chev. Impala's 4 door sedans per spec – $12,973, each, less allowance of one 1980 chev. and one 1981 Chev. as trade ins for a total of $16,337.88

2. Uebelhor Chevrolet Company – Two 1984 Chev. Impala's 4 door sedans per spec – $10,979.26 each, less allowance of a 1980 and 1981 chevrolets as trade ins for a total of $18,958.52.

3. Conner Ford Sales, Inc. – Two 1984 Ford Crown Victoria S 4 door sedan per spec – $11,000, each, less allowance of one 1980 Chev. and one 1981 Chev. as trade ins for a total of $18,750.

Sheriff McDurmon reviewed the bids and stated he has been happy with both the Chevy and Ford. The specs are correct on the low bid.

Knepper made the motion the low bid of Parsley Brothers for two units for the total $16,337.88 be accepted. Second by Wetzel. All in favor.

COUNTY PROPERTY (County Home) 36-1-11-4.1

Pastor Pavelka presented three appraisals on the 3½ acres the church is interested in purchasing at the County Home.

Attorney Robinson informed the Board: 1. the County Council needs to adopt a resolution approving the sell, 2. appraisal by two licensed appraisers, 3. publish notice, setting out the terms of the sale, 4. zoning, etc, 5. bids open to public inspection, 6. private sell or public auction, 7 bidder can raise his bid after other bidders have been notified.

He stated the appraisals will have to be paid by the county, and a survey will have to be made.

Pavelka informed the Board the appraisals he presented did not cost the county but they give an idea of the value of the property which is about $15,000.

Harlen recommended the board seek approval of the Council to sell the 3 1/2 acres by sealed bid for not less than $16,000, to cover the value of the property plus costs of the sell.

Knepper stated if the land is sold by public auction, the church has a better chance of getting the property. She made the motion to seek Council's approval to sell the 3 1/2 acres at sealed bid for not less than $16,000. Second by Wetzel. All in favor.

The Auditor was requested to seek a transfer of funds for $300, appraisals and $700, surveying.

VETERAN SERVICE OFFICER

Harlen stated John Garrett informed him he was withdrawing his application for VA Officer because he may have a better job opportunity. He presented recommendations from the St. Meinrad Legion, Abe Lincoln Post 444, Santa Claus Legion, Paralyzed Veterans of America, Director of Rehabilitation and Vanderburgh County Veterans, recommending the re-appointment of Larry Pounds.

DEFENDANT'S EXHIBIT 7

Commissioners Minutes January 7, 1985 (con't)

County Road Entrance (con't)

DeWeese read aloud an amendment to the Zoning Ordinance adopted December 1, 1980 by the Board of Commissioners. The guidelines are specific as to the requirements that must be met by the owner to assure proper drainage whether a private, commercial or filed entrance. The determination of the size of the pipe shall be made by the Zoning Administrator upon the advice of the Highway Superintendent.

Wetzel reported the zoning Administrator should contact the Highway Superintendent when new construction is applied for and after 30 days the Superintendent should view the site.

APPOINTMENTS

Haaff presented the yearly report filed by Larry Pounds.

Harlan called for a motion on the appointment of a Veteran Service Officer.

Scherer made the motion to appoint *Larry Pounds, Veteran Service Officer.* Second by Wetzel. All in favor.

Wetzel made the motion to appoint *Joe Harlen* to the *Indiana 15 Regional Board.* Second by Scherer.

Wetzel inquired if there were any objections to the re-appointment of Gary Byers to the Alcoholic Beverage Board?

Harlen answered he has nothing against Mr. Byers, but for personal reasons he can't vote for anyone. Scherer agreed he could not vote either. Robinson was to check to see who would make the appointment.

Wetzel made the motion *Joe Harlen and James Buckles* be appointed to the *Lincoln Hills Corporation Board.* Harlen called for a second, he called a second time. Harlen made the second. Scherer abstained.

DUMPSTERS (4-H Youth & Community Center)

Jerry Peckenpaugh requested removal of the county owned dumpsters from the 4-H property. He suggested they be moved to the highway garage property. Trash from the dumpsters blows in both directions along the highway causing the property to look unsightly.

Harlen made the motion the dumpsters be moved on the request of Peckenpaugh. Second by Scherer. All in favor.

Haaff is to inform Gentry to remove the dumpsters.

LANDFILL

Harlen informed the Board Charlie Brown informed him by phone at 7:40 A.M. he was in agreement the Board continue to withhold $3,500, a month from his contract to pay John Varner. Brown was due in Perry County for a bid letting.

The Board ordered Haaff to continue withholding $3,500, to Varner, $100, a month to the Highway Department and the balance of $5,000, to Charlie Brown.

Robinson is to forward a letter to Charlie Brown requesting confirmation of his phone conversation with Harlen to continue the payments.

The Board agreed Haaff does not have to keep records for Brown and Varner.

John Varner informed the Board if in the future Brown refuses county trash he has a 10 year contract with Brown that probably couldn't be broken without Brown's consent. The county also has a 10 year contract with Brown unless he defaults. The County has no contract with him. He reported if the county has extra dirt it would make excellent top soil at the site.

Wetzel reported he is still receiving complaints Brown is charging citizens a fee to dump there. He has a receipt to back that up.

Harlen reported he is receiving calls also.

Robinson was instructed to review the contract to determine if the Board could switch to Warrick County for awhile and also who is responsible for maintenance of the road.

Scherer stated if Perry County is hauling there, they may be responsible for maintenance also.

Wetzel recommended to proceed to dump at the site but refuse to pay Brown.

The Board reviewed the letter from State Board of Health whereby Brown's 2 year permit expires May, 1985.

DEFENDANT'S EXHIBIT 8

Commissioners Minutes December 16, 1985 (con't)

U.S. ARMY CORP. OF ENGINEERS

The Board approved Public Notice 85-KY-245 and Notice [illegible]

COURTHOUSE HOLIDAY

The Courthouse will be closed December 31, 1985 and January 1, 1986 for the New Year Holidays.

APPOINTMENTS

The following appointments were made:

Damon Dawson – 4 years – Welfare Board
Kenneth Jones – 4 years – Advisory Plan
Leonard Wittman – 4 years – Advisory Plan
Sandra Siddons – 4 years – Board of Zoning of Appeals
David Hemmer – 4 years – Board of Zoning of Appeals
Larry Pounds – 1 year – Veteran Service Office
Paul Frank – 1 year – Civil Defense Director
Elmer Gentry – 1 year – Sanitation Lead Man
Jack Robinson – 1 year – County Attorney
Bill Scherer – 1 year – Lincoln Hills
Jim Wetzel – 1 year – Advisory Plan
Jim Wetzel – 1 year – Indiana 15 Regional

The remaining appointments will be made December 30.

CONDEMNATION (Ordinance 85-7)

Surveyor Brown presented his reports on the structures on real estate owned by Jeff Monar and Donald Strahl in Luce Township.

The Board will consider the reports January 6 and Robinson is to review the Ordinance for the next procedure.

SPENCER COUNTY EMERGENCY AMBULANCE SERVICE

Norma Partridge reported the ambulance service has a surplus 77 Dodge. The Rockport Fire Department would like to have it for an emergency vehicle. The service would like to have $1,000, back in their maintenance fund to use toward maintenance of other vehicles.

Scherer reported he discussed this with the Council the other night. He would rather see the fire department have it for an emergency vehicle than someone else.

Harlen reported if he remembers correctly, the county sold the Town of Dale the burnt out ambulance and would have to do the same in this case. Would have to be fair.

Since it is county property going to a government agency, Robinson will view the statute for proceedures. [sic]

Adjourned at 12:10 to meet again December 30.

Board of Commissioners,

/s/ Joe Harlen

/s/ James E. Wetzel

/s/ Bill Scherer

Attest: /s/ Mary E. Haaff
Mary E. Haaff, Auditor

DEFENDANT'S EXHIBIT 10

Commissioners Organizational Meeting
January 2, 1987 (con't)

Scherer made the motion to re-appoint *Jack R. Robinson, County Attorney.* Second by Barclay. All in favor.

Haaff was requested to forward a letter to Attorney Lindsey acknowledging receipt of his application.

Robinson informed the Commissioners the State Board of Accounts required a contract in writing describing his duties.

The Commissioners approved the contract.

APPOINTMENTS

Wetzel made the motion to re-appoint *Elwin Link* to the *Alcoholic Beverage Board.* Second by Barclay. Scherer abstained.

On a motion by Scherer and a second by Barclay, the vote was unanimous on the following appointments:

Veteran Service Officer – Larry Pounds
Civil Defense Director – Paul David Frank
Sanitation Lead Man – Elmer Gentry
Road Supt. – Joe Detzer
Road Clerk – Carol Champion
Shop Foreman – Frank Blowers
Foreman #1 – Ted Lashley
Foreman #2 – Jess Weatherholt
Foreman #3 – Larry Snyder
Advisory Plan Commission – James Wetzel
Indiana 15 Regional – Hugh Barclay

Park & Recreation Bd. – C.T. Grubb
Zoning Board Member – Kenneth Jones

Wetzel made the motion to appoint *Sandra Siddons* to another four year term on the *Advisory Plan*. Second by Scherer. All in favor.

Wetzel made the motion to compensate Darrell Stephens as Superintendent for the days of January 1 and 2 of 1987 and Joe Detzer for the remainder of January. Second by Scherer. All in favor.

Barclay inquired if Stephens would be eligible for any fringe benefits in 1987?

Robinson answered he doesn't think there are any written terms.

Wetzel reported he didn't think Wilma Brown and Patsy Bates were particularly interested in remaining on the Contractual Library Board.

Barclay stated he has discussed the openings with some people who are interested. He made the motion to table any action on the appointments until the February meeting. Second by Scherer. All in favor.

Barclay made the motion to table the appointment to the Health Board until January 5 due to the question of the profession of the member to be appointed. Second by Scherer. All in favor.

Wetzel reported he had been informed Mr. Buckles current member, had not been attending the board meetings of Lincoln Hills and would like the opportunity to contact Larry Kleemen on the matter.

The Board voted unanimous to table any action on the appointment until January 5.

BONDS

The official bonds of Robert Dugas and Grace Boehman were approved.

The performance bonds of Coyote Battery Co., Inc. for Electrical Parts and Rebuilt were approved.

Haaff reported due to loosing the balance in the appropriation on Culvert on 950 N. because a contract was not awarded, she at Wandel suggestion, is seeking $15,000, additional funds.

Meeting adjourned at 8:45 A.M. to meet again January 5 at 9:00 A.M.

BOARD OF COMMISSIONERS,

/s/ James E. Wetzel

/s/ Bill Scherer

/s/ Hugh Barclay.

ATTEST: /s/ Mary E. Haaff

DEFENDANT'S EXHIBIT 11

Commissioners Minutes December 21, 1987 (con't)

BIDS (Highway and Sanitation for 1988) con't.

Item III – Diesel Fuel

Spencer County Co-op
Marathon Fuels, Inc.
Petroleum Traders Corp.
Roy Cox Oil Company, Inc.

Scherer made the motion to approve the bid of Spencer County Co-op. Second by Barclay. All in favor.

Item VII – Tires & Tubes
Tom's Tire & Supply, Inc.

Wetzel reported with the inventory on hand, he doesn't think the purchases in 1988 will exceed the statutory requirements without bid letting.

The Board agreed to table the bid.

APPOINTMENTS (1988)

The following re-appointments were made by a unanimous vote.

1. Jack R. Robinson, County Attorney
2. P.D. Frank, Civil Defense
3. Larry Pounds, Veteran Service Officer
4. Jess Weatherholt, Highway Supt.

The remainder will be made in 1988.

COURTHOUSE HOLIDAY

The Courthouse will be closed December 31 and January 1 in observance of New Years.

INDIANA DEPT. OF ENVIRONMENTAL MANAGEMENT

The Board reviewed the registered construction and operation status of National Office Furniture Co. – Distribution Center.

INDIANA BELL

Approved the request to bury cable under Co. Rd. 475 – 500' N. of Co. Rd. 775.

BONDS

The official bonds of J.R. Brown, Joyce Hoss, Linda Ryan, and Dallas Garrett were approved.

The performance bonds of Rockport Auto Parts on Items X, XI, XI-A & XII for Highway supplies were approved. The bid bonds were released.

The performance bond of Mulzer Crushed Stone for sand & gravel and Braden Const. for Bridge #144 and Culvert on Co. Rd. 275 E. were approved.

CORNERSTONES (Claim of Michael Feldbusch)

Neuhoff presented the claim for $8,700.

The Board stated they were not sure if there was a payment schedule and would like to review the contract.

Neuhoff reported the original bid is in her office, but she wasn't given anything else. She can get the bid if the Board wishes.

The Board inquired if the cornerstones had actually been located?

Robinson read from the claim whereby Surveyor Brown stated the location of the stones are on file in his office as required by law.

The Board agreed to table consideration of the claim until the 1st meeting of 1988.

DEFENDANT'S EXHIBIT 12

The meeting was called to order by President Wetzel at 9:00 A.M. All members were present. Also present was County Attorney Robinson.

Minutes of the December 5 meeting were read with one correction by Barclay, "the difference should read $115, instead of $125, on the bid of Braden Construction on Culvert on Co. Rd. 900 E."

Scherer made the motion to approve, second by Barclay. All in favor.

SURVEYOR CLAIMS

Scherer made the motion claims for legal drain inspection $918.72 and travel $167.58 not be signed or funds encumbered. Second by Wetzel.

CULVERT ON CO. RD. 900 E.

Commissioners signed the Change Order for Culvert on Co. Rd. 900 E. with a decrease of $115, for rip-rap.

The Commissioners accepted the bid of Braden Construction Co., Inc. for $8,725.

COUNTRY CABLE

Doug Shadhahl, representing Country Cable, requesting a frachise [sic] in Spencer County, appeared before the Commissioners. He had spoken to the Commissioners at the December 5 meeting.

Attorney Robinson explained some changes to the Ordinance he had recommended regarding how the cable be laid. They should not cut through any pavement and not place cable in ditches along County roads.

Mr. Shedhahl stated they operate according to standard utility form.

Wetzel questioned the tree trimming?

Shedhahl stated this is done on County right-of-way only. Most of their cable is underground. He also stated pedestals carry signs referring to buried cable. He stated there is an 800 number and can be here in 4 hours. With the new frachise [sic] there would be a local representative here for day to day service.

The County franchise would continue South along Hwy 231 to Co. Rd. 700 N. Richland is an unincorporated town so they will include the outlying sub-division.

Scherer asked how far north of Grandview they would go? He stated he lived about 1 mile North of Grandview.

Mr. Shedhahl replied they would have to check into that area.

Scherer made the motion to approve Ordinance 1988-4. Barclay seconded. All in favor.

VETERAN SERVICE OFFICER

Auditor Beckman presented President Wetzel a letter from V.S.O. Larry Pounds.

REZONING – SPENCER COUNTY CO-OP (Luce Twp.)

Scherer made the motion to approve the rezoning of property in Luce Twp. from Agriculture to general Business as requested by Spencer County Co-op. Barclay seconded. All in favor.

BONDS

The Commissioners signed the Public Official Bonds for Donald O. Patmore, Sandra Kay Bender, Dallas Simpson Garrett, Linda Ryan, Madonna Kline, Joyce Hoss, Phyllis Small, Louise Talbott, Sandra Fleischman & Connie Houle. They also signed the Performance Bond of Braden Construction Co., Inc. on Bridge #182. Alsc Contract Bond of The Rockport Printers for printing for 1989.

DEFENDANT'S EXHIBIT 13

SPENCER COUNTY
VETERANS SERVICE OFFICE

LARRY G. POUNDS
Courthouse – 1st Floor
Rockport, IN 47635
(812) 649-2212

Refer to: BOARD OF COMMISSIONERS
SPENCER COUNTY
YEAR-END REPORT

DECEMBER 14, 1988

BOARD OF COMMISSIONERS:

I will try to make a brief outline of the duties in this office that I have done for the year of 1988.

I have made on the average of twelve trips to the Louisville V.A. Hospital and eighteen to the V.A. Clinics and Nursing Homes within the county. These trips being to aid and assist fellow veterans.

I try to transport all WW I vets to medical aid, as they are too old to do it themselves, also, other SC (100%) veterans that can't drive. I have filled out over 90 income reports for the widows and their children.

This office will receive over 600 calls and walk-ins for other information. I assist in the Employment and ON THE JOB TRAINING PROGRAMS (for eligible vets), and also set them up on a free mail-in Drug program.

Over $100,000 per month of Accured [sic] Monetary Benefits are returned to Spencer County each year, which I think is a big help to our county!

Thank you for appointing me Veteran Service Officer "this year" and I looking forward to serving you in 1989.

Sincerely,

/s/ Larry G. Pounds
LARRY POUNDS, V.S.O.
(Filed Dec. 14, 1988)

Signature Dorothy A. Beckman
Auditor Spencer County

DEFENDANT'S EXHIBIT 14

COMMISSIONERS MEETING

January 3, 1989

Meeting was called to order at 8:30 A.M. by Auditor Beckman. Commissioners present were Hugh Barclay, Louis Lubbehusen and David Gripenstroh. Also present was County Attorney Robinson.

Minutes of the December 27, 1988 meeting were read and approved on a motion by Griepenstroh, second by Lubbehusen.

COMMISSIONER ORGANIZATION

Lubbehusen made the motion to appoint Hugh Barclay, President. Second by Griepenstroh. All in favor.

Griepenstroh made the motion to appoint Louis Lubbehusen, Vice President. Second by Barclay. All in favor.

APPOINTMENTS

INDIANA 15 REGIONAL

Griepenstroh made the motion to appoint Lubbehusen the Commissioners appointment to Indiana 15 Regional. Second by Barclay. All in favor.

ADVISORY PLAN COMMISSION

Lubbehusen made the motion David Griepenstroh be the Commissioners appointment to the Advisory Plan Commission. Second by Barclay. All in favor.

Griepenstroh made the motion to appoint Alvin "Grassy" Ebert to fill the expired term of Dennis Frakes. Second by Lubbehusen. All in favor. This appointment if a four (4) year term.

Lubbehusen made the motion to appoint Jerry Embry to fulfill the vacancy on the Board in place of the late Jerome Graman. Second by Griepenstroh. All in favor.

Kay DeWeese objected to the appointment of Embry to replace Jerome Graman, since this is a non-partisan board.

Griepenstroh stated the Board is non-partisan, 2 Republicans and 3 Democrats.

HIGHWAY

On the motion of Griepenstroh, second by Lubbehusen, the following highway appointments were made:

Superintendent: Jess Weatherholt
1st District Foreman: Ted Lashley
2nd District Foreman: Louis Seifert
3rd District Foreman: Rick Weatherholt
Road Clerk: Cindy Lashley
All in favor.

COUNTY ATTORNEY

Lubbehusen made the motion to table this appointment until February 6 meeting to give them time to review the applications.

Second by Griepenstroh.

All in favor.

CIVIL DEFENSE

Griepenstroh made the motion to appoint P.D. Frank, Civil Defense Director. Second by Lubbenhusen. All in favor.

VETERAN SERVICE OFFICER

Lubbehusen made the motion to appoint Don Patmore, Veteran Service Officer. Second by Griepenstroh. All in favor.

ALCOHOLIC BEVERAGE BOARD

Lubbehusen made the motion to re-appoint Elvin Link to the Alcoholic Beverage Board. Second by Griepenstroh. All in favor.

SANITATION LEAD MAN

Lubbehusen made the motion to table this appointment until February. Second by Griepenstroh. All in favor.

SHOP FOREMAN

Griepenstroh made the motion to appoint Bernie Vargel, Shop Foreman. Second by Lubbehusen. All in favor.